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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-489

ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County,

Petitioners,

v.

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DEMEO, DOUGLAS HAYS and CHARLES ZEITLMEN, on behalf of themselves and all others similarly situated and DEAN L. CRAIG and JOHN CHAWRYLUK, Intervening Plaintiffs,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE NOT PRINTED

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IN THE

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October Term, 1972

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ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County,

Respondents.

v.

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DEMEO, DOUGLAS HAYS and CHARLES ZEITLMEN, on behalf of themselves and all others similarly situated and DEAN L. CRAIG and JOHN CHAWRYLUK, Intervening Plaintiffs,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Commonwealth of Pennsylvania, by its Attorneys, ROBERT W. DUGGAN, District Attorney; J. KENT CULLEY, Assistant District Attorney; and RALPH LYNCH, JR.,

City Solicitor; DANIEL M. [illegible], Executive Assistant City Solicitor, respectfully prays that a writ of Certiorari Issue, and pursuant to Rule 23 of this Honorable Court, your petitioner respectfully represents as follows:

Opinions Below

Ozel Conley and other individuals named in the above caption, respondents herein, all of whom claimed to be indigents and all of whom were charged with criminal violations under the law of Pennsylvania brought this action in the United States District Court for the Western District of Pennsylvania at No. 70-1130 Civil Action against magistrates of the City of Pittsburgh and against the District Attorney of Allegheny County. The plaintiffs (respondents herein) charged their Civil Rights and Constitutional Rights as established in *Coleman v. Alabama*, 399 U. S. 1 (1970), were being violated in that the magistrates were not advising them of their right of counsel at preliminary hearings, that they were being refused counsel when requested and that preliminary hearings were being conducted in the absence of counsel. They also challenged the District Attorney's practice of presenting indictment and scheduling and conducting trials against indigents not represented by counsel at preliminary hearings after the effective date of *Coleman v. Alabama, supra*. The respondents sought both declaratory and injunctive relief.

On October 30, 1970 after a hearing before the Honorable Wallace Gourley, the Court granted the requested declaratory relief with respect to the Magistrates but denied the injunctive relief. The District Court's Opinion and Order filed October 30, 1970 is attached to this petition (p. 48). The Opinion reported at 321 F. Supp. 723 W. D. Pa. (1970).

On November 25, 1970 the respondents appealed the District Court's decision to the United States Court of Appeals for the Third Circuit at No. 71-1011.

After the filing of briefs and oral argument the Court of Appeals by its Opinion and Order of April 17, 1972, affirmed the Order of the District Court but remanded the case to the District Court for a further hearing. The Opinion and Order of the Third Circuit Court of Appeals is attached to this petition (67). The official report of this case has not been published.

On May 16, 1972, after an extension of the time for filing was granted, petitioners filed with the Court of Appeals for the Third Circuit a Petition for Reargument Under Rule 40 and for Rehearing by the Court *En Banc* under Rule 35 of the Federal Rules. On June 27, 1972 the Court denied the Petition for Rehearing *per curiam*. The Honorable Ruggero Aldisert filed a dissenting opinion. The Circuit Court's Order and the dissenting opinion are attached to this petition (75). The official report of this decision and dissenting opinion have not been published.

On July 3, 1972 petitioners filed a Motion for Stay of Mandate with the United States Court of Appeals for the Third Circuit in connection with this case pending its filing a petition for review by this Honorable Court on a writ of certiorari. On July 13, 1972 the Court of Appeals granted the Motion by extending the time to August 3, 1972.

Copies of the petitioner's Motion and the Court of Appeals' Order are attached to this petition (83).

On July 26, 1972 petitioners filed a Motion for Extention of Stay of Mandate Under Rule 41(b) with the Court of Appeals. On August 4, 1972 the Court of Appeals granted the Motion until Setpember 25, 1972.

Copies of the petitioner's Motion and the Court of Appeals' Order are attached to this petition (88).

Statement of Jurisdiction

1. The above referred to order of the United States Court of Appeals for the Third Circuit was entered April 17, 1972 and that Court's order denying the Petition for Rehearing was entered June 27, 1972.

2. The jurisdiction of this Honorable Court is invoked under 28 USCA, Section 1254(1).

Questions Presented for Review

The Court of Appeals after affirming the issuance of declaratory relief by the District Court, remanded the case to the District Court for a further hearing. Determination was to be made "whether steps have been taken to insure that the *Coleman* mandate will be followed in Allegheny County in the immediate future." The holding of the Court of Appeals decision reasoned that *Coleman* required that indigents be provided with counsel at "all" preliminary hearings and that it was imperative that Allegheny County comply with this mandate promptly.

Under the circumstances, the Petitioner raises the following questions:

1. Did not the Court of Appeals for the Third Circuit err by committing an unwarranted intrusion into and interference with the administration of State Court procedures in direct violation of *Younger v. Harris* and companion cases of the abstention doctrine?

2. Whether the right to counsel at a preliminary hearing is of sufficient constitutional weight in all instances to require a Court to order an injunction prohibiting the prosecution of indigents who are not provided with an attorney at that stage?

3. Whether the Court of Appeals should have dismissed the appeal because of mootness and because the petitioners are the improper parties?

Constitutional Provisions and Statutes

The Sixth Amendment to the Constitution of the United States in pertinent part provides:

> ". . . and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article III, Section 2 of the Constitution of the United States in pertinent part provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 USC § 1983 provides:

> CIVIL ACTION FOR DEPRIVATION OF RIGHTS
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> R. S. § 1979.

42 USC § 1988 provides:

PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

R. S. § 722.

28 USC § 1343 provides:

CIVIL RIGHTS AN ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any rights or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act

of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, 121, 71 Stat. 637.

28 USC § 2201 provides:

CREATION OF REMEDY

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12 (p), 72 Stat. 349.

28 USC § 2202 provides:

FURTHER RELIEF

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

28 USC § 2283 provides:

STAY OF STATE COURT PROCEEDINGS

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

The Pennsylvania Appellate Court Jurisdiction Act of 1970, July 31, P. L. ____, No. 223, Art. I, 17 P. S. 211.205 provides:

EXTRAORDINARY JURISDICTION

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or justice of the peace of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done. 1970, July 31, P. L. ____, No. 223, art. II, § 205.

The Pennsylvania Public Defenders Act, of December 2, 1968, P. L. ____, No. 385, 16 P. S. § 9960.6-7 (1970 Supp.), in pertinent part provides:

(a) The public defender shall be responsible for furnishing legal counsel, in the following types of cases, to any person who, for lack of sufficient funds is unable to obtain legal counsel:

• • •

(2) Where a person is charged with an indictable offense and has been held for grand jury action, in accordance with the provisions of the Pennsylvania Rules of Criminal Procedure, representation shall be provided at earlier stages of the prosecution in capital cases, and may be provided at earlier stages of the prosecution for a person charged with any other indictable offense;

• • •

For cause, the court of common pleas may, on its own motion or upon the application of the public defender, the defendant, or person charged with being a juvenile delinquent, appoint an attorney other than the public defender to represent the person charged at any stage of the proceedings. The attorney so appointed shall be awarded reasonable compensation, and reimbursement for expenses necessarily incurred, to be fixed by the judge of the court of common pleas sitting at the trial or hearing of the case and paid by the county.

The Pennsylvania Act of 1919, May 27, P. L. 306 § 1, 19 P. S. § 21 provides:

HEARING IN ASSAULT CASES

In all cases of prosecutions for assault or assault and battery, the alderman, justices of the peace, or magistrate, before whom such case is instituted, shall, before he binds any person so charged over to the court of quarter sessions upon the oath of any complainant, enter into a full hearing and investigation of the facts charged, and shall only bind over the defendant to the said court when he is satisfied from the evidence that the prosecution is reasonably well founded. 1919 May 27, P. L. 306, § 1.

The Pennsylvania Act of 1909, March 18, P. L. 42 § 1, 19 P. S. § 24 provides:

JUSTICE TO HOLD HEARING

In all cases of surety of the peace, the justice of the peace before whom such case is instituted shall, before he binds any one over to the next term of the court of quarter sessions and in the meantime to keep the peace, upon the oath of another, as provided by section six (Section 23 of this title) of the act of March thirty-one, one thousand eight hundred and sixty (Pamphlet Laws, four hundred and twenty-seven), enter into a full hearing and investigation of the facts; and shall only bind over the defendant when the evidence shows, to the satisfaction of the justice, that the prosecutor's or prosecutrix's danger of being hurt in body or estate is actual, and that the threats were made by the defendant maliciously and with intent to do harm. 1909, March 18 P. L. 42 §1.

The Pennsylvania Act of 1887, May 23, P. L. 158 § 1, 19 P. S. § 681 provides:

COMPETENCY OF WITNESSES GENERALLY

Except upon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with a criminal offense triable in the court of oyer and terminer ought to be committed for trial,

and except also upon a hearing under habeas corpus for the purpose of determining whether bail ought to be taken upon a commitment for murder in the first degree, or for the purpose of determining in any case how much bail ought to be required, or for the purpose of determining in any case whether a person committed for trial ought to be further held, and except also upon hearings before a grand jury, in none of which cases shall evidence for the defendant be heard, and except also as provided in section two of this act (Sections 682-684, 686, of this title) all persons shall be fully competent witnesses in any criminal proceeding before any tribunal. 1887, May 23, P. L. 158, §1.

The Pennsylvania Acts of 1957, July 11, P. L. 819 §§ 1, 2, 3, 4, 17 P. S. §§ 2084, 2085, 2086, 2087 provides:

POWER OF SUPREME AND SUPERIOR COURTS TO PROMULGATE CRIMINAL PROCEDURE RULES; SUSPENSION OF CONFLICTING STATUTES.

§ 2084

The Supreme and Superior Courts of Pennsylvania shall have the power to prescribe by general rule the forms of process, writs, pleadings, and motions, and the practice and procedure prior to and including verdict or plea of guilty and motions in respect thereto in all criminal cases and proceedings in the courts of oyer and terminer and courts of quarter sessions of every county and for all other courts having jurisdiction in criminal actions. Such rules shall be consistent with the Constitution of this Commonwealth and shall neither abridge, enlarge nor modify the substantive rights of any party nor the jurisdiction of any of the said courts, nor affect any statute of limitations. At the time of the adoption, promulgation, and publication of its general rules, the Supreme and Superior Courts shall fix the effective date thereof, which shall not be less than six months from the date of the adoption thereof. As soon as promulgated, a copy of all rules shall be sent to the prothonotaries or clerks of all courts which may be affected thereby,

and shall be published by such prothonotaries or clerks in the same manner as local rules adopted by such courts.

From and after the effective date of any rule promulgated under this section, and so long as said rule shall be operative, the operation of any act of Assembly relating to practice or procedure in such courts, and may be inconsistent with such rule. 1957, July 11, P. L. 819, §1.

INFERIOR COURT RULES

§ 2085

Each of the courts of oyer and terminer, quarter sessions, and other courts established by the General Assembly, may adopt additional local rules for the conduct of its business, which shall not be inconsistent with or in conflict with the general rules prescribed by the Supreme and Superior Courts of Pennsylvania. 1957, July 11, P. L. 819, § 2.

CRIMINAL PROCEDURAL RULES COMMITTEE

§ 2086

The Supreme and Superior Courts of Pennsylvania are hereby authorized and empowered to appoint a Criminal Procedural Rules Committee, the members of which shall have been admitted to practice before the Supreme Court of Pennsylvania, which shall assist the Supreme and Superior Courts of Pennsylvania in preparation, revision, promulgation, publication, and administration of the said general rules. 1957, July 11, P. L. 819, § 3.

COURT OFFICERS TO FURNISH INFORMATION

§ 2087

It shall be the duty of the judges, clerks, prothonotaries, and other officers of the several courts of record in this Commonwealth, to furnish to the Supreme and Superior Courts of Pennsylvania or to the Criminal Procedural Rules Committee such statistics and information, as may be reasonably requested, concerning the administration of justice in criminal

actions in said courts. In the event of the failure of any judge, clerk, prothonotary or other officer of such courts to comply with the requirements of this action, the Supreme Court of Pennsylvania may, after hearing impose such penalties as may be lawfully imposed for contempt of court. 1957, July 11, P. L. 819, § 4.

28 USC § 2111 provides:

HARMLESS ERROR

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, § 110, 63 Stat. 105.

Statement of Case

This case was brought by individuals claiming to be indigents, all of whom were charged with criminal violations of the laws of Pennsylvania and all of whom were unable to retain legal counsel at their preliminary hearings. They charged that under § 1983 of the Civil Rights Act, their Sixth and Fourteenth Amendment rights as established in *Coleman v. Alabama*, 399 U. S. 1 (1970), were being violated in that the magistrates of Allegheny County were not advising them, as indigents, of their right of counsel at preliminary hearings; that they were being refused counsel where requested and that preliminary hearings were being conducted in the absence of counsel. In addition, they challenged the District Attorney's practice of presenting indictments, scheduling trials and conducting criminal prosecutions against indigents who were not represented by counsel at preliminary hearings after June 22, 1970 the effective date of *Coleman v. Alabama, supra*. The plaintiffs sought declaratory relief in the nature of a statement of a ruling that the above practices were uncon-

stitutional. They also sought a permanent injunction against the District Attorney of Allegheny County enjoining him from proceeding to trial in any case in which an indigent was neither represented by counsel at his preliminary hearing nor knowingly and intelligently waived that right and an injunction against the Allegheny County Magistrates enjoining them from conducting any further preliminary hearings without first fully advising indigent defendants of their right of counsel and without appointing counsel where requested.

The United States District Court for the Western District of Pennsylvania assumed jurisdiction by virtue of 28 U. S. C. § 1343, 42 U. S. C. §§ 1983 and 1988 and 28 U. S. C. §§ 2201 and 2202. A hearing was held on October 19, 1970 before the Honorable Wallace Gourley, who granted the requested declaratory relief in his Opinion and Order of October 30, 1970, respecting the practices of the Magistrate—defendants but denied the injunctive relief. The Court found that injunctive relief was not appropriate since the *Coleman* decision had been rendered only four months prior to this case and there was at that time no practical way this decision could have been fully implemented. The plaintiffs appealed that decision to the United States Court of Appeals for the Third Circuit at No. 71-1011.

After the filing of briefs, oral argument was held in December of 1971 before the Honorable Francis L. Van Dusen, the Honorable James Hunter III and the Honorable Caleb R. Layton III, of the Third Circuit Court of Appeals. In an Opinion by the Honorable James Hunter III, the Order of the District Court was affirmed but the case was remanded to the District Court for a hearing to determine, "whether steps have been taken to insure that the *Coleman* mandate will be followed in Allegheny County in the

immediate future." This Honorable Court held that it interpreted the *Coleman* decision as requiring that indigents be provided with counsel at "all" preliminary hearings, and that it was imperative that Allegheny County comply with this mandate promptly. The date of the Opinion and Order was April 17, 1972.

Petitioners thereafter filed a Petition for Reargument under Rule 40 and a Petition for Rehearing By The Court *En Banc* Under Rule 35 of the Federal Rules of Procedure. The petition alleged, *inter alia:*

1. That the question of providing appellant's counsel at preliminary hearings was moot and consequently there was no controversy for the Court of Appeals to decide;

2. That the District Attorney was not the proper party to this action as he has no power to effectuate the relief sought;

3. That the Federal Courts have no jurisdiction to fashion state procedures for the administration of criminal justice; that the District Court erred in issuing declaratory relief and that the Order of the District Court should have, at the most, been affirmed by the Court of Appeals on the basis of the Abstention Doctrine;

4. That the Court of Appeals' interpretation of Coleman is so impossible that it cannot be complied with.

The Petition was filed May 16, 1972 after an extension of time to file was granted by the Court of Appeals. On June 27, 1972 the Court of Appeals, *Per Curiam*, denied the Petition for Rehearing with a dissenting opinion by Judge Aldisert.

ARGUMENT

Reason for Allowance of Writ

I. The Court of Appeals for the Third Circuit erred by an unwarranted intrusion into and interference with the administration of State Court procedures in direct violation of *Younger v. Harris* and companion cases and of the Abstention Doctrine.

(a) The decision of the Court of Appeals in this case is in direct conflict with *Younger v. Harris* and companion cases and constitutes a serious affront to federal-state relations.

Petitioners find untenable the proposition that federal courts can become involved in fashioning the preliminary procedures in connection with state court criminal matters. No basis can be found by petitioners in the federal constitution nor in cases adjudicated by your Honorable Court.

It is still true that the states are sovereign entities which have the right and the duty to fashion their own procedures for the administration of criminal justice.

Therefore, petitioners believe that this entire proceeding should have been dismissed as being beyond the jurisdiction of the federal courts.

In *Younger v. Harris*, 401 U. S. 36 (1971) this Court held that under well-established principles of comity, federalism, and equity jurisprudence, federal courts must refrain from enjoining pending state criminal prosecutions, absent extra-ordinary circumstances which were not present in *Younger* and are not present in the instant case.

In reversing the three-judge district court which had enjoined the district attorney from prosecuting Harris,

who had been indicted under California's Criminal Syndication Act (found unconstitutional by the district court), Mr. Justice Black, speaking for this Court, observed:

> The precise reasons for his longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity", that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . .
>
> This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. 401 U. S. 37 at 43-44.

Mr. Justice Black then reviewed a long line of cases in which the traditional policy of non-interference had been reaffirmed by this Court, including *Fenner v. Boykin*, 271

U. S. 240 (1926); *Watson v. Buck*, 313 U. S. 387 (1941); and *Douglas v. City of Jeannette*, 319 U. S. 157 (1943). At the same time he distinguished and very narrowly circumscribed *Dombrowski v. Pfister*, 380 U. S. 479 (1965) which respondents in the instant case regarded as controlling.

The District Judge in the instant case refused injunctive relief, concluding, even without the benefit of *Younger v. Harris* which had not yet been decided, that federal intervention of the kind demanded by plaintiffs was inappropriate. *Conley v. Dauer, supra.* The Court of Appeals, although agreeing that the District Judge should have withheld relief at the time because of the freshness of *Coleman v. Alabama, supra*, remanded the case for further inquiry into the steps that Allegheny County had taken to comply with *Coleman.* Its opinion concluded with a directive that if proper procedures were not instituted forthwith, the District Court should undertake remedial measures, and "should consider the appropriateness of injunctive relief pursuant to 28 U. S. C. § 2202". *Conley v. Dauer, supra* at 6 n. 4. This authorization of injunctive relief and continuing federal supervision of state criminal proceedings, contravenes *Younger v. Harris, supra*, and *Perez v. Ledesma*, 401 U. S. 82 (1971).

Although your Honorable Court in *Younger* acknowledged that there might be extreme instances justifying federal interference, no such conditions exist in the instant case. The novel suggestion of respondents in the courts below that petitioners were acting in bad faith by the mere fact that they held allegedly unconstitutional preliminary hearings is clearly untenable under *Younger v. Harris*, since it is the prosecution as such and not procedures employed during the course of it, which must be in

bad faith or as a harassment tactic. As outlined in this brief in Section III below, respondents were charged on individual occasions with a variety of crimes, which charges and criminal statutes were not in issue in this case. The District Judge found that the state authorities were making good faith efforts to accommodate themselves to the *Coleman* decision. 321 F. Supp. at 731. In addition, there is nothing in the pleadings or on the record which could indicate any bad faith or harassment in the prosecution of any of the respondents. See Conley v. Dauer, 321 F. Supp. at 731.

In addition, this Court in *Younger* re-emphasized its adherence to the traditional equitable doctrine requiring "irreparable injury" for injunctive relief. When the "fundamental policy" against federal interference with state prosecutions is coupled with this doctrine, then even irreparable injury is insufficient unless it is "both great and immediate". 401 U. S. at 46. Most importantly, *Younger* makes clear that exposure to criminal trial, the possible prejudice of an improper preliminary hearing, is not the sort of consequence which amounts to an irreparable injury:

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not be themselves be considered "irreparable" in the special legal sense of that term. 401 U. S. at 46.

The *Younger* view accords with a long line of cases rejecting federal intervention even where the alleged deprivation of constitutional rights would result in adverse consequences, including confinement, during the course of a criminal prosecution. See, for instance, *Stefanelli v. Minard*, 342 U. S. 117 (1951); *Wilson v. Schnettler*, 365

U. S. 381 (1961); *Perez v. Ledesma, supra.* As this Court observed in *Stefanelli,* in refusing to enjoin a state prosecution based on evidence obtained by an allegedly unconstitutional search:

> If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grant and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution. 342 U. S. 117, 123-23; 72 S. Ct. 118, 121-22.

In the instant case the District Court specifically found no irreparable injury:

> Moreover, the Court does not find that plaintiffs and others similarly situated will suffer irreparable injury by the denial of the injunctive relief requested. In *Coleman v. Alabama, supra,* the Supreme Court specified the remedy available to an indigent defendant deprived of his right to counsel at a preliminary hearing—he may challenge the validity of his conviction where the deprivation of his right to counsel at a preliminary hearing, in fact, was prejudicial. 321 F. Supp. at 371.

The Court of Appeals, while acknowledging *Younger v. Harris, Perez v. Ledesma,* and related cases in a footnote, *supra,* at 6, n. 14, did not discuss the applicability of these cases to the present situation. In the same footnote it

did suggest two bases for federal intervention and injunctive relief. First, the Court of Appeals, following an earlier Third Circuit case, found that 28 USC § 2202 (1964) authorized injunctive relief in aid of the Civil Rights Act, 42 U. S. C. § 1983 (1964) and was an "expressly authorized" exception to the Federal Anti-Injunction Act, 28 USC § 2283 (1964). The correctness of this view has subsequently been established by this Court in *Mitchum v. Foster*, ____ U. S. ____, 92 S. Ct. 2151 (1972).

This does not answer the arguments against injunctive relief in this case, however, which are based on equitable and comity considerations. As the majority opinion in *Mitchum v. Foster*, pointed out:

> . . . [I]n so concluding [that § 2202 is an exception to the anti-injunction act], we do not question or qualify in any way the principles of equity, comity, and federalism. 92 S. Ct. at 2162.

See also the concurring opinion of Chief Justice Burger at 92 S. Ct. 2151, 2162-63 (1972).

The second reason advanced by the Court of Appeals in finding injunctive relief permissible was that the District Court had awarded respondents a declaratory judgment in this case:

> . . . [A]lthough we expect Allegheny County to fully comply with the District Court's declaratory judgment, a decision by the County to move ahead with prosecutions in disregard of that declaratory judgment could not be ignored. Not to allow injunctive relief in this case would place the District Court in the position of having granted declaratory relief and then being unable to remedy the County's rejection of that judgment. This we cannot accept. Given the unique posture of this case, the District Court on remand should consider the appropriateness of injunctive relief pursuant to 28 U. S. C. § 2202.

The District Court's decision was rendered, and the time for appeal had expired, prior to the decision of this Court in *Samuels v. Mackell*, 401 U. S. 66 (1971); holding that federal court interference with state criminal proceedings by way of declaratory judgment is improper. The Court of Appeals, nevertheless, apparently felt that one bad turn deserved another, concluding that although the declaratory judgment appeared to be erroneously granted in view of *Mackell*, since defendant-petitioners did not appeal that declaratory judgment the District Court can now issue an injunction to exact compliance, despite *Younger*. This Court should not allow this bootstrap reasoning to contravene its plain and emphatic holdings in *Younger* and *Mackell*.

Regardless of the history of the present case, it is indisputable that despite this Court's prohibition the Court of Appeals has advised the District Court to proceed with *very real interference* of the state judicial process. On this point see the Dissenting Opinion *Sur* Petition for Rehearing of Circuit Judge Aldisert. The interference in the instant case is, in fact, much more extreme than in any of the Supreme Court cases, since here not merely one prosecution, or prosecutions under one particular statute, is interrupted, but rather *thousands of cases* covering a broad spectrum of complaints.

The wisdom behind the long-standing policy of federal noninterference is underscored by the practical considerations involved in the instant case. If federal intervention is allowed at this point, the most probable consequence is an end to many if not all preliminary hearings in Allegheny County and presumably throughout the state, in other than non-capital cases. This situation was alluded to by Mr. Justice White in *Coleman*, 399 U. S. at 17-18 (Concurring Opinion).

Although there has been good faith attempt to comply with *Coleman*, the length of time which has transpired since the District Court case suggests that Allegheny County is unable in the foreseeable future to overcome the difficulties referred to in both the opinions of District Court and Court of Appeals. *Conley v. Dauer*, 321 F. Supp. at 730-31 (1970) and No. 71-1011, *supra* at 4, n. 5 and 6, in providing counsel at all preliminary hearings (Of course if this Court agrees with Petitioners that the Court of Appeals erred in concluding that *Coleman* requires counsel at all preliminary hearings, then an accommodation limited to serious cases may well be practicable).

Although in Pennsylvania an accused has the right to a preliminary hearing before indictment, in the fact of a federal injunction, the District Attorney may be forced to certify all non-represented cases to the Court of Common Pleas for leave to present a bill of indictment to the grand jury without a preliminary hearing, in accordance with Pennsylvania Rules of Criminal Procedure 224. In the alternative, the Supreme Court of Pennsylvania may have to consider revising the Rules of Criminal Procedure to allow direct indictments as in some states. The other possibility, of course, is that *numerous defendants charged with misdemeanors will entirely escape just convictions* through the inability of Allegheny County to conduct preliminary hearings.

On the other hand, if federal relief is withheld at this time, then respondent's constitutional challenges will be considered by state appellate courts on a case-by-case basis in accordance with traditional procedure. Pennsylvania appellate courts, in accordance with *Coleman*, can examine the record to see if the absence of counsel at the preliminary hearing prejudiced the accused at trial, or whether such absence constitutes harmless error.

Petitioners do not believe that there will be a significant extra burden imposed on state appellate courts in reviewing absence-of-counsel appeals. A review of the disposition of the criminal cases against the respondents in this instant action suggests this. Certainly where the grand jury subsequently dismisses the charges, as with respondent Ozel Conley, the criminal defendant will have no need to appeal. The same would be true of those defendants found not guilty at trial, as was respondent Earl Agurs. A guilty plea at trial (where the accused would be entitled to counsel) would eliminate any grounds for appeal (respondents Douglas Sizemore and Joseph Bolan). Those given probation or a modest fine would seldom appeal.

Finally petitioners believe that in cases where the accused is convicted and sent to jail, rarely would absence of counsel at preliminary hearing be the primary motivation for appealing. The myriad other constitutional challenges which defense lawyers, especially public defenders, are able to glean from even the simplest of trials suggests that absence of counsel will usually play a minor role on appeal.

In any event, if petitioners are in error and appellate burdens begin to approach the level of the acknowledged significant difficulties in providing counsel at preliminary hearings, *Conley v. Dauer*, No. 71-1011 at 5, then certainly the Commonwealth of Pennsylvania will have to consider the problem. ***But it should be permitted that choice!***

(b) Even ignoring the prohibition of *Younger v. Harris*, the Court of Appeals should have affirmed the District Court because a controlling issue of state law made The Abstention Doctrine applicable.

The Abstention Doctrine mandates the withholding of federal jurisdiction until an issue of state law is authoritatively determined by a state court. *Wright, Federal Courts*, 196 (2d ed. 1970). As do the traditional principles of equity and comity underscored in *Younger v. Harris, supra*, the Abstention Doctrine emphasizes the policy of non-interference by federal courts with state procedures unless absolutely necessary. For example, in *Harrison v. N. A. A. C. P.*, 360 U. S. 167, 176 (1959), where the N. A. A. C. P. sought injunctive relief against certain state statutes which Virginia authorities were utilizing to harass the organization the Court held:

> This now well-established procedure (Abstention) is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments • • • should at all times actuate the federal courts,' *Matthews v. Rodgers*, 284 U. S. 521, 525, 52 S. Ct. 217, 219, 76 L. Ed. 447, as their 'contribution • • • in furthering the harmonious relation between state and federal authority • • •.' *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 501, 61 S. Ct. 643, 645, 85 L. Ed. 971. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them [Citations omitted]. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the

> policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *City of Chicago v. Fieldcrest Dairies, Inc., supra*, 316 U. S. at pages 172-173, 62 S. Ct. at page 988. The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at lease materially charge the nature of the problem.

See also *Reetz v. Bozanich*, 397 U. S. 82 (1970), where the Court vacated a judgment that state fishing laws and regulations were unconstitutional in giving special rights to those who had held licenses before. Despite the fact that the plaintiffs would suffer harm through delay and loss of any fishing rights in the interim, the High Court required that the District Court abstain so that the Alaska State Court could determine the state constitutional questions that could decide the case.

In the instant case petitioners assert, as they have in the courts below, that the constitutional questions advanced by respondents *should have been first considered by the state courts* in a proceeding for appointment of counsel under Sections 6 and 7 of the Public Defender Act, Act of December 2, 1968, P. L. ____, No. 385, 16 P. S. § 9960.6-7 (1970 Supp.). These provide, in relevant part:

> § 9960.6
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> (a) The public defender shall be responsible for furnishing legal counsel, in the following types of cases, to any person who, for lack of sufficient funds is unable to obtain legal counsel:
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> • • •
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> (2) Where a person is charged with an indictable offense and has been held for grand jury action.

> In accordance with the provisions of the Pennsylvania Rules of Criminal Procedure, representation shall be provided at earlier stages of the prosecution in capital cases, and may be provided at earlier stages of the prosecution for a person charged with any other indictable offense;
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> • • •
>
> 9960.7
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> For cause, the court of common pleas may, on its own motion or upon the application of the public defender, the defendant, or person charged with being a juvenile delinquent, appoint an attorney other than the public defender to represent the person charged at any stage of the proceedings. The attorney so appointed shall be awarded reasonable compensation, and reimbursement for expenses necessarily incurred, to be fixed by the judge of the court of common pleas sitting at the trial or hearing of the case and paid by the county.

The District Court, in apparently the first interpretation ever of this Act, held that the Act cannot be interpreted as requiring representation of indigent defendants by counsel at preliminary hearings:

> Clearly the language "may" as used in the two provisions is permissive, not mandatory, for the legislature used the word "shall" in the Act where a mandate was intended. 321 F. Supp. at 727.

But there have been instances where the Pennsylvania Courts have given the word "may" a mandatory interpretation. *Commonwealth v. Johnson*, 440 Pa. 342, 352, 269 A. 2d 752 (1970); *Seligsohn Appeal*, 410 Pa. 270, 274-75, 189 A. 2d 746, 748 (1963); *Commonwealth ex rel. Fox v. Swing*, 409 Pa. 241, 245, 46, 186 A. 2d 24, 26 (1962).

It is submitted that in view of *Coleman v. Alabama*, *supra*, Pennsylvania Courts might well extend the meaning of these sections of the Public Defender Act and the Rules of Criminal Procedure to include, if not all preliminary hearings, at least those for the more serious crimes.

The State Courts should be given this opportunity to interpret the scope of *Coleman* and adjust their procedures to it. Respondents have not allowed them this opportunity. Although the Pennsylvania Supreme Court was asked to take original jurisdiction of their case, *Conley v. Dauer*, No. 3328 Mis. Docket (1970), this was an extraordinary proceeding under the Appellate Court Jurisdiction Act of 1970, P. L. ____, No. 223, 17 P. S. § 211.205 and was properly refused. Respondents have never instituted a suit in the Court of Common Pleas seeking the relief they have now been authorized by the federal appellate court.

Not only is there an unresolved issue of state law interwoven into the case, but the issue involves the state courts themselves. *Where the responsibilities of state courts are concerned, it is all the more vital that deference be given the state system!*

In *Randall v. Newark Housing Authority*, 384 F. 2d 151 (3rd Cir. 1967), the plaintiff sought to enjoin allegedly unconstitutional eviction proceedings. The District Court dismissed the Complaint for want of subject matter jurisdiction. This Honorable Court remanded to allow plaintiffs the opportunity to brief and argue fully the question of subject matter jurisdiction. In remanding, the Court of Appeals pointed out that abstention was especially advisable where it gave state courts "a chance to act and to construe their own duty." 384 F. 2d at 157. See also *Tribune Review Publishing Company v. Thomas*, 120 F. Supp. 363, 373 (W. D. Pa. 1954).

Finally, abstention may co-exist with the grant of declaratory relief. The court below apparently believed that abstention and the grant of declaratory relief were mutually exclusive (R. 16a-17a). On the contrary, where state

law issues in a case go to the question of remedies, the Supreme Court has encouraged the lower federal courts to decide only the constitutional issues and to abstain from any action with regard to remedies. Note, Federal-Question Abstention, 80 Harv. L. Rev. 604, 621 (1967). Your Honorable Court is requested to do so here where a question of state court procedure is at issue.

II. The right of counsel at a preliminary hearing is not of sufficient constitutional weight in all instances to require a Court to order an injunction prohibiting the prosecution of indigents who are not provided with an attorney at that stage.

(a) There is no constitutional requirement that counsel be provided for indigents at all preliminary hearings.

While the *Coleman* decision identified the preliminary hearing as a "critical stage" of the prosecution in that particular case, the Court failed to explain the constitutional basis for such an assertion. The dilemma in *Coleman* was summarized by Mr. Chief Justice Burger in his dissent at 399 U. S. 1:

> I wish to make clear that my disagreement with the prevailing opinion is directed primarily at its reasoning process, rather than with the broad social and legal desirability of the result reached. I would not decide that the Constitution commands the results simply because I think it is a desirable one . . . this (right to counsel at the preliminary hearing) should be provided either by statute or by the rule-making process since the Constitution does not require it. 399 U. S. at 24.

The *Coleman* Majority could not themselves determine the precise constitutional foundation for this decision. Mr. Justice Brennan, joined by Justices White and Marshall,

wrote the majority opinion and used "the principle of *Powell v. Alabama*, 287 U. S. 45 (1932) and succeeding cases . . . [which require that the Court] scrutinize any pretrial confrontation . . . to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial." 399 U. S. at 8. However, this basic right to a fair trial was rejected as a basis by others in the majority. Justices Black and Douglas declared that this alleged right was guaranteed by the Sixth Amendment, not by any obscure inferred "right to a fair trial." But as both Stewart and Burger noted, these interpretations surely strain the "plain meaning" of the sections of the Constitution quoted by the majority. Perhaps the most revealing opinion was that of Mr. Justice Harlan who, in concurring, admitted that were it not for the recent decisions of *Miranda v. Arizona*, 384 U. S. 436 (1966), *United States v. Wade*, 388 U. S. 218 (1967), *Gilbert v. California*, 388 U. S. 263 (1967), *Mathis v. United States*, 391 U. S. 1 (1968), and *Orozco v. Texas*, 394 U. S. 324 (1969) he would have voted to affirm the convictions. He most reluctantly agreed to strain the facts of those cases to the facts of *Coleman*.

The inability of the Court to agree upon a "basis for the decision" in *Coleman* is evidence that, rather than interpreting the Constitution, the Court instead was engaged in "judicial legislating"; or as Burger observed, the Court "simply seeks to reshape the Constitution in accordance with its own predilections of what is desirable." 399 U. S. at 24.

Following *Adams v. Illinois*, 92 S. Ct. 916 (1972), which rejected *Coleman's* retroactivity, Mr. Chief Justice Burger again make this point: "Nothing could better illustrate the extraconstitutional scope of *Coleman* than its interpretation how to explain why we do not make it retroactive."

92 S. Ct. at 921. In *Adams*, Justice Blackmun, who had not joined in Coleman made it clear that he felt that the *Coleman* case had been wrongly decided. 92 S. Ct. at 921.

A comparison of the remedy provided by *Coleman* with that of remedies of violations of constitutional rights in other areas (see below) makes it difficult to assert that an actual constitutional right was newly discovered by the *Coleman* Court. It is even more difficult to reach this conclusion after the holding of *Adams v. Illinois, supra.* Petitioner thus urges that despite the *Coleman* decision, no new right was declared, upon which the presently sought injunctive relief could lie.

(b) The violation of the right to counsel at the preliminary hearing is not so basic to a fair trial that a possible violation should require extraordinary equitable relief.

In a 6-2 decision, the United States Supreme Court, in *Coleman*, ruled that failure to provide counsel at his preliminary hearing might have affected Coleman's right to a fair trial. The case was remanded to the state courts for a determination of whether such denial of the right to counsel was harmless or prejudicial error. 399 U. S. at 26.

Mr. Justice Brennan, writing for the six majority members, declared that the preliminary hearing was a "critical stage" so as to require the furnishing of counsel to protect Coleman's rights. Five justices agreed to remand the case to the state court to determine if Coleman's rights had been prejudiced at the preliminary hearing even though the state had not used, at trial, anything that had occurred at the hearing. Justice Black based his concurring opinion upon this right being within the Sixth Amendment. Justice Harlan felt that the conviction should not be reversed unless the defendants could show that the lack of counsel resulted in actual prejudice; and Chief Justice Burger and

Justice Stewart dissented, holding that the Constitution simply does no require the assistance of counsel at the preliminary hearing stage.

Despite the Court's determination of the "constitutionality" of the right to counsel at a preliminary hearing, the remedy set forth by the *Coleman* Court gives sufficient foundation to petitioners' allegation here that this right is not so constitutionally mandated that an injunction would lie against prosecuting *all* indigents not represented by counsel at their preliminary hearings.

The test which the Supreme Court applied was that of the "harmless error" test of *Chapman v. California*, 386 U. S. 18 (1967). In *Chapman*, the Court squarely faced whether the presence of constitutional errors, regardless of the facts and circumstances, must always be deemed harmful ". . . (and) would require an automatic reversal of . . . convictions." The Court declined to adopt such a rule, stating: "We decline to adopt any such rule . . ." 386 U. S. at 21-22. The Court noted that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U. S. at 22.

By applying the "harmless error" rule in the *Coleman* case, the Court clearly indicated the status of the right to counsel at a preliminary hearing. The *Chapman* Court had indicated that "some Constitutional rights are basic to a fair trial that their infraction can never be treated as harmless error . . ." 386 U. S. at 23. Examples of this are *Gideon v. Wainwright*, 372 U. S. 335 (1963), and *Glasser v. United States*, 315 U. S. 60 (1942), requiring automatic reversal.

Clearly this is not the Court's approach taken in *Coleman*! The Court instead adopted the reasoning in *Chapman* noted "Congress established . . . the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties', 28 U. S. C. § 2111." 386 U. S. at 22. In effect, the *Coleman* Court was saying that while the preliminary hearing is a critical stage, for a violation at this point to affect the proceedings it must be shown that the accused's rights were actually violated by that illegal procedure. In this regard, the Court was following sound logic and the precedents of many other cases, including but not limited to: *Henry v. Bull*, 1 Wheat. 4 L. Ed. 21 (1816); *Greenleaf v. Birth*, 5 Pet 132, 8 L. Ed. 72 (1831); *Lucas v. Alexander*, 279 U. S. 573 (1929); *Bollenback v. United States*, 326 U. S. 607 (1946); *Brown v. Allen*, 344 U. S. 443 (1953); *Ginsburg v. United States*, 383 U. S. 463 (1966); *Harrington v. California*, 395 U. S. 250 (1969).

From the above cited cases it is clear that there can be constitutional errors which will not affect the result of the conviction. Since the "harmless error" test was applied by the *Coleman* Court, it is the law established by *Coleman* that the right to counsel at a preliminary hearing must be included within this line of cases.

Therefore, an injunction is not an appropriate remedy here, for the very act of enjoining prosecution presumes that irreparable damage would automatically result from prosecution without counsel at the preliminary hearing. We note that the question of whether an error was harmless within § 269 of the Judicial Code (28 USC 391- Now 28 USC 2111) is not to be determined as a matter of presumption, but rather according to the situation involved in the particular case. (*Kotteakos v. United States*, 328 U. S. 750 (1946).

It is significant to note that the Court in Coleman did not follow its earlier decisions in *Hamilton v. Alabama*, 368 U. S. 52 (1961), and *White v. Maryland*, 373 U. S. 59 (1963). While both of these cases dealt with lack of counsel at the preliminary hearing, both cases revealed actual prejudice at the preliminary hearing stage itself which "injured" the accused at that point, not at his later trial. In those two cases, the Court reversed the convictions. In the instant case, however, no prejudice has yet occurred. If prejudice does occur in any case, there is an adequate remedy through the *Coleman* application of the *Chapman* "harmless error" doctrine. Therefore, petitioner asserts that an injunction at this point would be inconsistent with the *Coleman* holding and other relevant decisions on this subject as discussed above.

In addition, in light of *Arsenault v. Massachusetts*, 393 U. S. 5 (1968) the denial of Coleman's retroactivity by the Supreme Court in *Adams v. Illinois*, *supra*, weakens the argument that *Coleman* established a "basic" right to counsel at the preliminary hearing.

The Supreme Court noted in *Arsenault* that decisions pertaining to "the right to counsel [of an accused in a state prosecution] at the trial, on appeal, and at the other 'critical' stages of the criminal proceedings have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial.'" 393 U. S. at 6. Such cases affording retroactive treatment have been: *Gideon v. Wainwright*, *supra*, right to counsel at trial; *Douglas v. California*, 373 U. S. 353 (1963)—right to counsel on appeal; at sentencing—*Mempa v. Rhay*, 389 U. S. 128 (1967); and at other proceedings in which the rights of an accused were adversely affected—*White v. Maryland*, *supra*, and *Hamilton v. Alabama*, *supra*.

In *Adams v. Illinois*, *supra*, this Honorable Court failed to hold that *Coleman* was to be applied retroactively. The Court declared that it gives complete retroactive effect to a new rule "where the major purposes of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function." The *Adams* decision further speaks of different degrees of constitutional rights:

> . . . the question of whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree . . . Thus, although the rule requiring the assistance of counsel at a lineup is aimed at avoiding unfairness at trial by enhancing the reliability of the fact-finding process in the area of identification evidence; we held that the probabilities of infecting the integrity of the truth-determining process by denial of counsel at the lineup were insufficiently less than the omission of counsel at the trial itself or on appeal that those probabilities must in turn be weighed against the prior justified reliance upon the old standards and the impact of retroactivity upon the administration of justice.
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> We hold that, similarly, the role of counsel at the preliminary hearing differs sufficiently from the role of counsel at trial in its impact upon the integrity of the fact-finding process as to require the weighing of the probabilities of such infection against the elements prior justified reliance and the impact of retroactivity upon the administration of criminal justice. We may lay aside the function of counsel at the preliminary hearings that do not bear on the fact-finding process at trial—counsel's help in persuading the Court not to hold the accused for the Grand Jury or meanwhile to admit the accused to bail.
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> Of counsel's other functions—to fashion a vital impeachment tool (for use at trial) . . . to discover the case the state has against his client . . . may make . . . contribution to the enhancement of the fact-

finding process . . . But because of limitations upon the use of preliminary hearings for discovery and impeachment purposes, counsel cannot be as effectual as at trial or on appeal.

We . . . agree . . . that *the lack of counsel at a preliminary hearing involves less danger to the integrity of the truth determining process at trial than the omission of counsel at the trial itself or on appeal.* Such danger is not ordinarily greater . . . at a preliminary hearing at which the accused is unrepresented than at a pretrial lineup or interrogation conducted without the presence of an attorney. 92 S. Ct. at 918-919. (Emphasis supplied.)

From *Adams*, then, it is apparent that the right to counsel at the preliminary hearing is not so fundamental as to warrant application to victims of previous "unconstitutional" conduct. Since this is true and the Court recognizes the difference in the role of counsel at trial versus that of the counsel at the preliminary hearing so much so as to require the "weighing [of] the probabilities [of such infection against the elements of] prior justified reliance and *the impact . . . upon the administration of criminal justice.*" 92 S. Ct. at 920. (Emphasis supplied), then the Court should now take similar note in the case before it.

If the right spoken of in *Coleman* is not sufficiently basic to require retroactivity, then this Court should not permit the mere possibility of future prejudice to result in a massive injunction based on that right. Since the Supreme Court has linked the *Coleman* right with other "lineup" rights as in *Wade and Gilbert*, does this mean that next injunctions will issue prohibiting the holding of all lineups until counsel is provided? Surely this is not what the Constitution means to protect when it speaks of the right to counsel at criminal convictions. Surely the havoc which such a decision would play upon the system of jus-

tice in America warrants a firm refusal to enjoin "potential" violations of this *Coleman* right. The *Coleman* decision has provided the apparatus through appellate scrutiny and the "harmless error" test to deal with any actual prejudices which might occur. Injunctive relief at this point not only is impractical, but also against the professed spirit of *Coleman* as held in *Adams v. Illinois*.

(c) Under Pennsylvania law, an accused has no right to counsel at the preliminary hearing.

In Pennsylvania, there is no general legislation requiring preliminary hearings (*Commonwealth v. O'Brien*, 181 Pa. Superior Ct. 382, 124 A. 2d 666 (1956). Preliminary hearings are required in assault cases and assault and battery cases (See 19 P. S. 21; 19 P. S. 24; 19 P. S. 681). However, the Pennsylvania Rules of Criminal Procedure have sections concerning preliminary hearings.

The Pennsylvania Rules are adopted as authorized by 17 P. S. 2084-2087. Rule 116 gives an arrestee by warrant the right to a preliminary hearing "without unnecessary delay," and Rule 118 requires the same for arrests without a warrant. Both sections provide that the hearings can be delayed by either the Commonwealth or the defendant for a period of from 3 to 10 days. Both sections also mention the defendant's attorney, but neither make any provision for providing counsel for indigents.

Rule 120 discusses the rights of the parties at the preliminary hearing, but only *Section d* of Rule 120 mentions court-assigned counsel:

(d) A defendant, charged with a capital offense, shall have the right to have counsel assigned to represent him at the preliminary hearing. Adopted January 31, 1970; effective May 1, 1970.

Rule 318, Assignment of Counsel (designed to implement *Gideon v. Wainwright, supra*) states that in capital cases, counsel shall be assigned as soon as practicable after the preliminary arraignment (Rule 318 (a) (1)). In non-capital cases, if the defendant is indigent, counsel is appointed "to represent him in his trial and on a direct appeal from any judgment of sentence" (Rule 318 (b)(1)). This assignment is to be made "as soon as practicable after the case has been docketed in the office of the Clerk of Court but in any event before indictment" (Rule 318 (b) (2)) or counsel can be assigned by the court "whenever the interests of justice require it" (Rule 318 (b) (3)).

Thus, the statutory basis for requiring counsel to be appointed at the preliminary hearing in Pennsylvania is very shallow, if non-existent. Since the Rules do provide for appointment of counsel as soon as practicable after the preliminary arraignment in capital cases (Rule 318 (a)(1)), but no such time is mentioned in non-capital cases, then by application of the canon of construction of *expressio unius* it must be assumed that there exists only the right to such appointed counsel in capital cases.

Pennsylvania case law supports this conclusion as well. Unlike *White v. Maryland, supra,* and *Hamilton v. Alabama, supra,* in this state a defendant need not plead at the preliminary hearing (*Maisenhelder v. Rundle,* 229 F. Supp. 506 (E D Pa. 1964); and even if he does plead, no rights are lost (*United States ex rel. Parker v. Myers,* 233 F. Supp. 563 (E D Pa. 1964, aff. 341 F. 2d 303, 3rd Cir. 1965). Thus, it has been held, prior to Coleman, that in Pennsylvania the preliminary hearing is not a "critical phase" of

the criminal process (*Commonwealth v. Frye*, 433 Pa. 473, 252 A. 2d 580 (1969), cert. den. 396 U. S. 932 (1969). It was noted that absent unusual and prejudicial circumstances which transform the proceedings into a critical stage, failure to be represented by counsel at the preliminary hearing is not a violation of constitutional rights (*Commonwealth ex rel. Pinnie v. Russell*, 422 Pa. 313, 220 A. 2d 796 (1966); *Commonwealth ex rel. Hobbs v. Russell*, 420 Pa. 1, 215 A. 2d 858 (1966); *Commonwealth ex rel. McCant v. Rundle*, 418 Pa. 394, 211 A. 2d 460 (1965); *Commonwealth ex rel. Mumford v. Cavell*, 423 Pa. 312, 228 A. 2d 640 (1967).

Only when actual prejudice occurred whereby an element of the crime was not established at the preliminary hearing (*Commonwealth v. Taylor*, 219 Pa. Superior Ct. 334, 280 A. 2d 405 (1971) or where the victim failed to identify the defendant (*Commonwealth v. Brown*, 217 Pa. Superior 190, 269 A. 2d 383 (1970) have the courts found substantial prejudice through the lack of counsel at the preliminary hearing. In effect, in these cases, the courts are following *White v. Maryland, supra*, and *Hamilton v. Alabama, supra*.

The Pennsylvania Supreme Court in *Commonwealth v. James*, 440 Pa. 205, 269 A. 2d 898 (1970), in a decision following *Coleman*, discussed the denial of counsel at a juvenile certification hearing ["similar if not the same as a preliminary hearing," the Court stated at 440 Pa. at 210]. The Court there declared that denial of counsel at this point cannot be "equated with the denial of such assistance at trial or during proceedings to determine guilt." 440 Pa. at 209. The Court held that "it was quite apparent from the majority opinion in *Coleman* . . . wherein the court stated that absence of counsel . . . would, if there were an absence of prejudice, constitute harmless error. Certainly, the denial of counsel at trial would never be harmless error." 440 Pa. at 210.

It is thus petitioners' opinion that there is neither statutory nor case law within Pennsylvania upon which the respondents can base the plea for an injunction prior to the holding of the preliminary hearing and before any prejudice results.

(e) Even if the Coleman decision would require counsel to be appointed at the preliminary hearing, this injunction should not lie since all parties concerned are doing all within their power to accomplish the implementation of the Coleman mandate.

The Rules Committee, in the notes following Rule 318 of Pennsylvania Rules of Criminal Procedure, commented upon the seriousness of the problem now inherent in the Court's decision in *Coleman*. In deciding not to require appointed counsel at such hearings, the Committee commented:

> An ideal rule would authorize the appointment of counsel even at the preliminary hearing stage. However, the impossibility of being able to make such provisions work is readily recognized. There are approximately 5,000 issuing authorities throughout the state who accept complaints and hold hearings at almost every hour of the day and night. To require counsel to be appointed by a court of record to attend proceedings before the minor judiciary—in some instances, many miles away—just would not work. Therefore, so as to carry out the mandate of the Supreme Court of the United States, to the best of our ability, and at the same time to maintain without disruption, our present practice, it was decided to authorize the appointment of counsel when the case is returned to court for action by the Grand Jury.

The Committee realized that the primary reason for the preliminary hearing is to protect the individual's rights against unlawful arrest and detention. *Commonwealth ex rel. Maisenhelder v. Rundle, supra.* It took notice of the

fact that at preliminary hearings the evidence is generally not presented by a District Attorney, but by the arresting police officer or the complainant, who are not schooled in the law. It appears obvious as it was to Mr. Justice White in the *Coleman* decision, that "requiring the appointment of counsel (at preliminary hearing stage) may result in fewer preliminary hearings in jurisdictions where the prosecution is free to avoid them by taking a case directly to a grand jury. Our ruling may also invite eliminating the preliminary hearing system entirely." (399 U. S. at 18.

Certainly, Mr. Justice White's warning applies in this case. With 64 elected district magistrates, 5 City of Pittsburgh Police Magistrates, and 44 Justices of the Peace and aldermen qualified to conduct the some 15,000 preliminary hearings that occurred in 1970 alone (Statistics taken from Safer Community; An Analysis of Crime and Criminal Justice of Allegheny County, Pennsylvania, Allegheny Regional Planning Council for the Governor's Justice Commission, pg. 50 Feb. 1972) the implications of such injunctive relief requested in this case upon the criminal justice system would be staggering.

Despite the lack of a clear state legislative mandate encouraging or requiring the provision of counsel at this point, the Public Defender's Act of December 2, 1968, No. 358, 16 P. S. 9960, 6-7 (1970 Supp.) provides:

> 6.—The Public Defender . . . represented shall be provided at earlier stages in capital cases and *may* be provided at earlier stages . . . of other indictable offenses.
>
> 7.—Court of Common Pleas . . . *may* appoint an attorney . . . at any stage of the proceedings.

Despite the use of the permissive word *may* in the pertinent legislation, it should be noted that already the office

of the Public Defender has received the approval of the Regional Planning Council for a federal grant for, and has begun hiring, 12 full-time attorneys to defend only indigents at preliminary hearings (*RPC report, supra,* pgs. 55-56).

Surely this is not the time to issue an injunction which would bring a halt to the entire criminal justice process within this county when good faith attempts at implementing *Coleman* are now underway. The public at large would suffer severely from such a stoppage. Even more directly "inconvenienced" would be hundreds of arrestees who would normally be released following a preliminary hearing but who, following such an injunction, would have to languish for extensive periods while the state's fiscal and statutory provisions catch up with the judicial mandates.

Such reasoning was also the thrust of the opinions of Justices Powell and Rehnquist in the recent case, *Argerslinger v. Hamlin,* 92 S. Ct. 2006 (1972). Although both justices concurred in the result reached by the majority, *i.e.* that the lower court had erred in denying defendant, an indigent, his right to counsel at trial for a "petty offense", neither agreed that a defendant, absent a valid waiver, may not be imprisoned for even petty offense, unless he was represented by counsel at his trial.

Mr. Justice Powell, in a well-reasoned opinion, exposed the practical weaknesses in the Majority's rigid rule and rejected this expansion of due process. He stated:

> Despite its overbreadth, the easiest solution would be a prophylactic rule that would require the appointment of counsel to indigents in all criminal cases. The simplicity of such a rule is appealing because it could be applied automatically in every case, but the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems of 50 States. This is

apparent when one reflects on the wide variety of petty or misdemeanor offenses, the varying definitions thereof, and the diversity of penalties prescribed. The potential impact on state court systems is also apparent in view of the variations in types of courts and their jurisdictions, ranging from justices of the peace and part-time judges in the small communities to the elaborately staffed police courts which operate 24 hours a day in the great metropolitan centers.

The respondents have cited two District Court cases in which injunctions issued to protect any indigents right at preliminary hearings (*Phillips v. Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968); and *Bramlett v. Peterson*, 307 F. Supp. 1311 (M. D. Florida, 1969)). Petitioners urge the Court here to distinguish the holdings in *Phillips* and *Bramlett* from the case at hand. In *Phillips*, the injunction issued against Sunflower County, Mississippi, which had a population figure of 37,047 as of April 1, 1970 (statistics from the Commercial Atlas). In *Bramlett*, the population of Volusia County was somewhat larger—169,487 as of April 1, 1970 (statistics from Commercial Atlas)—but even this falls ridiculously short of Allegheny County's population of 1,605,160 as of the same date (U. S. Bureau of Census figures)!

The folly of fashioning a similar type remedy in cases of such different factual bases (*i.e.*, the population to be affected) should be readily apparent. *A result which might have worked in lightly populated, mainly-rural, Southern counties should not be the guide in this case of a densely-populated, highly urban, industrialized city of the North.* Such an order in this case could only create undue havoc in an already-straining judicial system—havoc creating more detriment to all county residents than any potential benefits which might arise in some individual and isolated cases.

In *State v. Green*, 470 S. W. 2d 571, 10 Cr. L. 2041 (1971), the Supreme Court of Missouri recognized that the problem of providing attorneys for indigent defendants should not be the burden of the courts nor the attorneys alone.

In spite of *Gideon v. Wainwright, supra*, which held that the federal Constitution requires the states to furnish counsel to indigent defendants, the Court in *Green* noted (10 Cr. L. at 2042) that only defense attorneys are not provided with compensation by Missouri State law. Others essential to the criminal justice system—prosecuting attorneys, assistance to the Attorney General, psychiatrists, *et al.*—receive compensation for their services through legislative provisions. Therefore, despite a long history of providing such gratuitous services, the Court takes notice of the increasing demand on attorneys both in assignment numbers and in the extensive demands of a criminal case itself and holds that no longer will the Court compel attorneys to discharge a "duty which constitutionally is the burden of the State." (10 Cr. L. at 2042).

The Court invited the legislature to remedy the situation by enacting appropriate legislature to provide for attorney's fees and expenses and thus resolve this problem with a permanent solution.

In deciding the *Ozel Conley* case, your Honorable Court should follow the rationale of the *Green* case. Just as in *Green*, the Commonwealth of Pennsylvania has failed to provide by statute sufficient legal resources to meet the "duty which constitutionally is the burden of the State."

As the Court in *Green* has promised to no longer provide "free" counsel in the face of legislative inaction, so too should this Court refuse to place such an ever-increasing burden upon the states to provide for services which are not mandated by statute. Just as the Court in *Green* held

that the legal profession should not continue to bear this burden of providing counsel alone, the Court in the present case should refuse to apply court-made remedies to a problem which is, in essence, within the peculiar domain of the State legislature.

III. The Court of Appeals should have dismissed the appeal because the case is moot and petitioners are not the proper parties.

Article III, Section 2, of the Constitution of the United States empowers federal courts to adjudicate only actual cases or controversies.

In Summary, the respondents claimed that they had been denied defense counsel at preliminary hearings for serious offenses and that basically as a consequence they could not properly defend against these charges at trial. The fundamental problem complained of was the alleged patent inability of trial counsel to defend properly.

During the pendency of their appeal, the respondents had their criminal charges disposed of in the state courts. Your petitioners checked the appropriate court records, determined the status of respondents' cases, and listed the disposition in their Petition for Rehearing, pages 6 and 7, as follows:

(a) Ozel Conley—the November 1970 grand jury dismissed the charges against him;

(b) Lewis Steward—no charges pending;

(c) Douglas Sizemore—plead guilty to Burglary at No. 1137 February Term 1971 on January 7, 1972 and was placed on 10 years' probation;

(d) Fred Green—was found guilty of Use of Narcotic Drugs at No. 896 February 1971 and was fined an amount of $50.00;

(e) Joseph Bolar—plead guilty to Solicitation to Commit Sodomy at No. 6825 June, 1970 and was placed on probation for a period of one year;

(f) Earl Agurs—was found not guilty of Armed Robbery, Receiving Stolen Goods and Violation of the Uniform Firearms Act at No. 6252 September 1971 on September 27, 1971;

(g) Marvin Kennedy—was found guilty of Larceny of an Automobile at No. 6951 October 1970 on December 11, 1970 and was sentenced to serve a term of imprisonment of from six to eighteen months;

(h) Charles De Meo—was found guilty of Violation of the Dangerous Drug and Cosmetic Act at No. 7228 October Term 1970 on March 26, 1971 and was sentenced to serve a term of imprisonment of 1 to 2 years, concurrent with a previous sentence.

(i) Douglas Hays, Charles Zeitlmen, Dean Craig and John Chawryluk were not listed in the district court according to the crime charged. However, appellee was able to determine that indictments were brought against them as follows: Hays has no indictment pertinent to the time period in question; Zeitlmen was found guilty of Attempted Burglary at No. 1145 February 1971 on September 17, 1971 and was placed on 1 year probation; Craig was indicted at 1052 February 1971 for Burglary, Larceny and Receiving Stolen Goods—he failed to appear for trial on May 2, 1972 and his bond was forfeited. And John Chawryluk was found guilty of Violation of the Dangerous Drug & Cosmetic Act at No. 1172 February 1971 on July 23, 1971 and was placed on probation for a period of three years.

In the several instances where respondents were found not guilty, they certainly did not suffer from the failure of the magistrate to appoint counsel. Those who plead guilty waived all non-jurisdictional defenses by virtue of their plea, so they could not challenge on appeal the question of counsel at preliminary hearings. Those few respondents

who were found guilty had an adequate state remedy by virtue of the state appellate process. They have not exercised their right to a direct appeal and the time period in which to do so has lapsed. The same remedy advanced by this Court in *Coleman*, that of a remand for a state court evidentiary hearing, would have been available to these respondents. However, they specifically chose not to pursue the matter further. With the exception of Dean Craig who failed to appear for trial, not a single appellant had standing to pursue the appeal before the Court of Appeals.

Under these circumstances, the Court of Appeals should not have considered the case because the controversy is moot and its opinion is merely advisory as it affects others.

It is true that the District Court in this case found that respondents adequately represented several classes of individuals charged with state criminal offenses: a class comprised of those indigent defendants who have had preliminary hearings without being afforded counsel and who have been bound over to court, a class comprised of all indigent defendants who await preliminary hearing scheduled in the future, and persons presently in jail in lieu of bond and others who have been released on bond. Almost two years have expired since the District Court hearing and it is unlikely that any original class plaintiffs still maintain the same status or any status which would give them standing. It is submitted that new criminal defendants, not charged at the time this action was commenced, are not proper plaintiffs, under this Court's decisions in *Younger v. Harris, supra*, and *Boyle v. Landry*, 401 U. S. 77 (1971).

Finally, the parties against whom this action was originally brought, are improper parties. Neither the Magistrates of the City of Pittsburgh nor the District Attorney have the power to appoint counsel or provide counsel to indigents in preliminary hearings.

Conclusion

For the reasons stated above it is urged that the Petition be granted and that this Honorable Court issue Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ROBERT W. DUGGAN,
District Attorney,

J. KENT CULLEY,
Assistant District Attorney,

RALPH LYNCH, JR.,
City Solicitor,

DANIEL M. CURTIN,
Executive Assistant City Solicitor,

Attorneys for Petitioners.

APPENDIX A

Opinion of Federal District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DeMEO, DOUGLAS HAYS and CHARLES ZEITMAN, on behalf of themselves and all others similarly situated,
Plaintiffs,

and

DEAN L. CRAIG, JOHN CHAWRYLUK,
Intervening Plaintiffs,

v.

ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh, and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County,
Defendants.

Civil Action No. 70-1130.

OPINION

WALLACE S. GOURLEY, *Senior District Judge:*

In this civil action, the original and intervening plaintiffs are all indigent persons who have been charged with, but not yet indicted for, offenses in violation of the criminal laws of Pennsylvania. Defendants are Magistrates of the City of Pittsburgh, Pennsylvania, and the District Attorney of Allegheny County, Pennsylvania. H. David Rothman,

Esquire, has intervened as *amicus curiæ* on behalf of Allegheny County and the minor judiciary thereof.

Plaintiffs challenge the constitutionality of the practices of defendant-Magistrates in conducting preliminary hearings. Challenged in the first instance is the refusal of defendant-Magistrates to advise indigent defendants that they are entitled to the representation of counsel at their preliminary hearings and to appoint counsel for this purpose upon request. Secondly, plaintiffs challenge as unconstitutional the refusal of defendant-Magistrates to provide transcripts of preliminary hearings, without cost, to indigent defendants who have been represented by certain counsel at their preliminary hearings but will be represented by different counsel at their trials. The Court has jurisdiction by virtue of 28 U. S. C. § 1343, 42 U. S. C. §§ 1983 and 1988, and 28 U. S. C. §§ 2201 and 2202.

Plaintiffs seek to maintain this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. They contend, and the Court finds, that plaintiffs adequately represent what are, in effect, three classes of individuals charged with State criminal offenses. The first class is comprised of those indigent defendants who have had preliminary hearings without being afforded the representation of counsel and who have been bound over to court to await grand jury proceedings. The second class is comprised of those indigent defendants who have been afforded the representation of counsel at preliminary hearings, have been bound over to court to await grand jury proceedings, will be represented at trial by counsel other than those which represented them at the preliminary hearings, and have been refused free transcripts of the preliminary hear-

ings. The third class is comprised of all indigent defendants who await preliminary hearings scheduled in the future. Within each class are persons who are presently confined in jail in lieu of bond and others who have been released on bond.

Both declaratory and injunctive relief are sought. Plaintiffs seek a declaration that the aforementioned practices of defendant-Magistrates are unconstitutional. They also seek an injunction: (1) restraining defendant-District Attorney from presenting an indictment and/or scheduling and proceeding to trial in any case in which an indigent defendant has neither been represented by counsel at a preliminary hearing nor knowingly, understandingly, and intelligently waived a right to such representation; (2) restraining defendant-District Attorney from scheduling and proceeding to trial in any case where an indigent defendant will be represented at trial by counsel other than the one which represented him at his preliminary hearing and a request for a transcript of the preliminary proceedings, without cost, has been denied him, and (3) restraining defendant-Magistrates from conducting any preliminary hearings without advising indigent defendants of their rights to representation by appointed counsel at said hearings and without appointing or securing appointed counsel where requested.

A final hearing upon the relief requested by plaintiffs was held on October 19, 1970. Motions to dismiss presented by defendants at the outset of the hearing were taken under advisement. The material facts are not in dispute, the parties having entered into oral and written stipulations with regard thereto.

In Allegheny County, which includes the City of Pittsburgh, indigent defendants are represented at trial either by the Office of the Public Defender of Allegheny County or, in some instances, by private attorneys appointed by the Court of Common Pleas of Allegheny County and compensated from County funds. In capital cases, indigent defenders are provided with representation by the Public Defender or court-appointed private attorneys shortly after preliminary arraignments and thereafter. Thus, in capital cases, indigent defendants are represented by counsel at preliminary hearings. In other cases, indigent defendants are provided with representation by the Public Defender or court-appointed private attorneys only upon being bound over to Court, and, therefore, they are not represented at preliminary hearings by counsel.

Prior to August 15, 1970, defendant-Magistrates provided no means of recording the proceedings at preliminary hearings. Since that date, defendant-Magistrates have provided mechanical tape recordings of said proceedings. These tape recordings are made available for the use of counsel for the defendant and may be transcribed at the expense of the defendant. No public funds have been made available to pay the cost of a transcription desired by an indigent defendant.

In this action, defendants strongly urge the Court to abstain from rendering an adjudication and dismiss the Complaint. Whether the Court should abstain from rendering declaratory relief is a question apart from whether injunctive relief should be granted. *Zwickler v. Koota*, 389 U. S. 241, 254 (1967). Abstention is a doctrine not to be lightly invoked. Discussing the broadened jurisdiction

conferred upon the federal judiciary by various Congressional enactments, including the statutory provisions upon which jurisdiction is founded here, the Supreme Court stated in *Zwickler v. Koota, supra*, at 248:

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .,' *Robb v. Connolly*, 111 U. S. 624, 637. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' *Stapleton v. Mitchell*, 60 F. Supp. 51, 55; see *McNeese v. Board of Education*, 373 U. S., at 674, n. 6. *Cf. Cohens v. Virginia*, 6 Wheat, 264, 404. The judge-made doctrine of abstention, first fashioned in 1941 in *Railroad Commission v. Pullman Co.*, 312 U. S. 496, sanctions such escape only in narrowly limited 'special circumstances.' *Propper v. Clark*, 337 U. S. 472, 492."

Although it has been aptly stated by my distinguished colleague, the Honorable Edward Dumbald, that "to wander in the domain of absention is to find oneself in a 'darksome Wood' or 'obscure forest',"[1] attempts have been made to delineate those "special circumstances" in which abstention is appropriate. Absention has been deemed proper:

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[1] *Clark v. Ellenbogen, et al.*, Civil Action 70-185, W. D. Pa., decided September 23, 1970, at p. 1.

1. To avoid the decision of a federal constitutional question where the case may be disposed of on questions of State law.

2. To avoid needless conflict with the administration by a state of its own affairs.

3. To leave to the States the resolution of unsettled questions of state law, and

4. To ease the congestion of the federal docket.

Wright, Federal Courts, 196 (2ed 1970).

Defendants contend that, before deciding the constitutional questions presented here, the Court should afford the State courts an opportunity to resolve the questions under State law. Specifically, they point to Sections 6 and 7 of the Public Defender Act, Act of December 2, 1968, P. L. ____, No. 358, 16 P. S. § 9960.6-7 (1970 Supp.). Section 6 provides in pertinent part:

> "(a) The public defender shall be responsible for furnishing legal counsel, in the following types of cases, to any person who, for lack of sufficient funds, is unable to obtain legal counsel:
>
> • • •
>
> (2) Where a person is charged with an indictable offense and has been held for grand jury action. In accordance with the provisions of the Pennsylvania Rules of Criminal Procedure, representation shall be provided at earlier stages of the prosecution in capital cases, and *may* be provided at earlier stages of the prosecution for a person charged with any other indictable offense;
>
> • • •" (Emphasis supplied.)

Section 7 provides:

> "For cause, the court of common pleas *may*, on its own motion or upon the application of the public defender, the defendant, or person charged with being a juvenile delinquent, appoint an attorney other than the public defender to represent the person charged at any stage of the proceedings. The attorney so appointed shall be awarded reasonable compensation, and reimbursement for expenses necessarily incurred, to be fixed by the judge of the court of common pleas sitting at the trial or hearings of the case and paid by the county." (Emphasis supplied.)

The aforequoted provisions cannot be interpreted as mandating representation of indigent defendants by counsel at preliminary hearings. Clearly the language "may" as used in the two provisions is permissive, not mandatory, for the Legislature used the word "shall" in the Act where a mandate was intended. No matter of interpretation is presented, nor would the application of Sections 6 and 7 of the Act by the State courts obviate the necessity of deciding the constitutional questions presented here. There is no intertwining of the constitutional rights asserted here with questions of State law, and abstention on that ground is not warranted.

While abstention may well be appropriate to avoid needless conflict with the administration by a State of its own affairs, the Supreme Court has indicated in *Zwickler v. Koota, supra*, that the federal courts may not abdicate their responsibility to entertain requests for declaratory relief upon federal constitutional claims merely because injunctive relief upon such claims would be deemed improper. Declaratory relief here does not involve such an interference with the administration of State affairs as would warrant abstention.

I turn then to plaintiffs' contention that defendant-Magistrates are violating the constitutional rights of plaintiffs and others similarly situated by refusing to advise them that they are entitled to be represented by counsel at their preliminary hearings and by refusing to provide counsel for this purpose where the presence of counsel has not been knowingly and understandingly waived. I believe the recent decision of the Supreme Court in the case of *Coleman v. Alabama*, 399 U. S. 1 (1969) does require such a conclusion. In the *Coleman* case, decided on June 22, 1970, the Supreme Court declared the Alabama preliminary hearing to be a "critical stage" in that State's criminal process, at which the provision of counsel is constitutionally required. The purposes of the Alabama preliminary hearing are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable. Defendants concede that the purposes of the Pennsylvania preliminary hearing are the same. The Pennsylvania preliminary hearing must, therefore, also be regarded as a "critical stage" in this State's criminal process, and the provision of counsel at the preliminary hearing is equally required here.

Defendants argue, nevertheless, that *Coleman v. Alabama, supra*, only requires counsel to be furnished in a situation where the accused ultimately will be able to demonstrate *actual* prejudice resulting from the failure to have counsel at his preliminary hearing. In so asserting, defendants rely on the fact that, in *Coleman* the Supreme Court remanded the case to the Alabama Courts to determine whether the denial of counsel at petitioners' preliminary hearing resulted in prejudice to petitioners' trial,

using the test of harmless error under *Chapman v. California*, 386 U. S. 16 (1967).

Defendants interpretation of the *Coleman* decision is a strained one. The Supreme Court stated at p. 9 of the decision:

> "The determination whether the hearing is a 'critical state' requiring the provision of counsel depends, as noted, upon an analysis 'whether *potential* substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.' *United States v. Wade, supra* at 227." (Emphasis supplied.)

It is the *potential* prejudice existing in any preliminary hearing confrontation and not the *actual* prejudice resulting in any given case which led the Court to conclude that the preliminary hearing is a critical stage in the criminal process, requiring the presence of counsel.

To assert that counsel is required only at a preliminary hearing where actral prejudice ultimately will result from counsel's absence is to confuse the constitutional right with the remedy for the violation thereof. The Supreme Court stated in the *Chapman* case, *supra*, at 22:

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

The fact that the failure to afford counsel at a preliminary hearing may not, in the circumstances of a given case, be so prejudicial as to require vacation of the conviction does not render the presence of counsel at a preliminary hearing any less of a constitutional right or the failure to provide

counsel at such a hearing any less of a violation of that right. I therefore conclude that the present practice of defendant-Magistrates in conducting preliminary hearings without providing counsel for indigent defendants is violative of their rights under the Sixth and Fourteenth Amendments to the Constitution.

Plaintiffs' second contention is that the Constitution requires the State to provide a free transcript of a preliminary hearing to an indigent defendant who has been represented by a particular counsel at the hearing but will be represented by different counsel at trial. An indigent defendant's constitutional right to a free transcript of his preliminary hearing for use at trial has been recognized in *Roberts v. LaVallee*, 389 U. S. 40 (1967). In that case, the Supreme Court ruled violative of the Equal Protection Clause of the Fourteenth Amendment a New York statute which provides that a transcript of a preliminary hearing would be furnished to a defendant only upon payment of a fee and reversed the conviction of an indigent defendant who had requested but had been denied a free transcript of his preliminary hearing for use at trial. The Court stated at p. 42:

> "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, *e.g. Draper v. Washington*, 372 U. S. 487 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956). Only last term in *Long v. District Court of Iowa*, 385 U. S. 192 (1966), we reiterated the statement first made in *Smith v. Bennett*, 365 U. S. 708, 709 (1961), that 'to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that

prisoner the equal protection of the laws.' We have no doubt the New York statute struck down by the New York Court of Appeals in *Montgomery*, as applied to deny a free transcript to an indigent, could not meet the test of our prior decisions."

In *Roberts v. LaVallee, supra*, the Supreme Court apparently was confronted with a procedure in New York whereby reporters customarily recorded preliminary hearings but only provided written transcriptions of the records thereof upon payment by the defendant of a fee. The decision has been deemed applicable, however, to require also the recording of preliminary hearings where previously none had been made. In *Gardner v. United States*, 407 F. 2d 1266 (D. C. Cir. 1969), the United States Court of Appeals for the District of Columbia, while refusing on the basis of harmless error to set aside the conviction, held that the failure of the District to record preliminary hearing proceedings and to provide indigent defendants with transcripts of such proceedings violated the defendants' rights. The Court of Appeals stated at p. 1268:

"The rampant confusion in the present case as to what happened in the Court of General Sessions, compounded by conflicting and blurred recollections, gives substance to our worst fears about the consequences of failing to record a preliminary hearing. In some cases denial of a written transcript may in fact be harmless error. But where, in contrast to the unusual circumstances of this case, there is any colorable claim of prejudice, it will be impossible for us to find the error harmless if there is no authoritative way for us to discover what actually transpired. Moreover, where as an erroneous denial of written transcript is generally remediable, a prejudical failure even to record the proceedings may often be incurable. *Therefore, especially in view of the constitutional status accorded an indigent's right to a transcript by Roberts v. LaVallee,*

> *supra, it now appears essential that every preliminary hearing be transcribed, whether by court recorder or by tape recording, regardless of whether any request for transcription is made.* In the exercise of our supervisory responsibility we so instruct the courts and the Commissioners of the District of Columbia. It is expected that appropriate procedures will be taken to assure that transcriptions once made are preserved. (Emphasis added.)"

As interpreted, *Roberts v. LaVallee, supra,* requires both that the preliminary hearing proceedings be recorded and that a transcription, in one form or another, be made available on request to an indigent defendant for use at trial. While plaintiffs assert this right only on behalf of those indigent defendants who have been represented by one counsel at their preliminary hearings and will be represented by another counsel at trial, the right must be regarded as equally applicable to those indigent defendants who are represented by the same counsel throughout the proceedings.

The decision of the Supreme Court in *Coleman v. Alabama, supra,* merely serves to reinforce the importance of the right of an indigent defendant to a free transcript of his preliminary hearing upon request. In *Coleman,* the Supreme Court concluded that the presence of counsel at a preliminary hearing is essential for the following reasons, stated at p. 9:

> "First, the lawyer's skilled examination and cross examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrates to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross examination of the State's witnesses at the trial, or preserve testimony favorable to the accused

of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail."

It is apparent from the aforequoted that counsel's presence was deemed essential to assure the fairness not only of the preliminary hearing but also of the trial itself. The second enumerated benefit of counsel's presence, to fashion a vital impeachment tool or to preserve the favorable testimony of one who does not appear at the trial, is a benefit which, as a practical matter, cannot be realized without there being available to counsel at trial a verbatim transcript of the preliminary hearing.

While *Roberts v. LaValle, supra*, requires that preliminary hearing proceedings be recorded and that a free transcript of those proceedings be made available to an indigent defendant for use at trial, either the services of a court reporter or a reasonable alternative thereto may be used to record the proceedings. *Draper v. Washington*, 372 U. S. 487, 495 (1962), *Griffith v. Illinois*, 351 U. S. 12, 20 (1955), *Gardner v. United States, supra*, at 1268. The provision and use of a tape recorder at preliminary hearings will satisfy the State's obligation provided that counsel may have effective use of the recording at trial. Because one of the primary uses of the recording is for purposes of impeachment, I conclude that a typewritten transcription must be provided, if not by secretarial services supplied by the State, at least at the expense of the State.

Turning to plaintiffs' request for injunctive relief, the Court finds that it is confronted with considerations substantially different from those which governed the determination to render declaratory relief. In *Douglas v. Jeannette*, 319 U. S. 157, 163 (1942), the Supreme Court stated that federal courts, sitting in equity, should refuse "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear or imminent." This policy was reaffirmed in *Dombrowski v. Pfister*, 380 U. S. 479, 484 (1965), where the Court, although carving out an exception where a chilling of First Amendment rights was threatened, stated:

> ". . . (C)onsiderations of federalism have tempered the exercise of equitable power, for the Court has recognised that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework."

The relief requested is the enjoining of various stages of State criminal proceedings against plaintiffs and all others similarly situated. In effect, the Federal District Court is asked to bring to a halt a substantial number of criminal proceedings in the State Court. Plaintiffs have a heavy burden in establishing their rights to such broad relief, and it has not been met here.

The decision of the Supreme Court in *Coleman v. Alabama*, *supra*, was rendered but four months ago. Shortly after the *Coleman* decision, members of the Court of Common Pleas of Allegheny County, the Commissioners of Allegheny County, the Public Defender of Allegheny County, the District Attorney of Allegheny County, the Solici-

tor of Allegheny County, the Solicitor of the City of Pittsburgh and members of the Neighborhood Legal Services Association met to consider the implications of the decision and the manner in which it could be implemented. Applications have been made to the Pennsylvania Crime Commission to secure funds for the representation of indigents at preliminary hearings.

However, it is evident that not only the City of Pittsburgh and the County of Allegheny but also the entire State of Pennsylvania will be required to make substantial changes in criminal procedures in order to accommodate the decision. Throughout the State, there is an extremely large number of members of the minor judiciary who have the power to preside over criminal proceedings. In Allegheny County alone, more than two-hundred and thirty-five members of the minor judiciary are empowered to preside over preliminary hearings. The impracticality, if not the impossibility, of having counsel appointed by a court of general jurisdiction to attend proceedings before the minor judiciary, in some instances many miles away, was recognized prior to the *Coleman* decision. See Rule 318 of the Pennsylvania Rules of Civil Procedure, Comment of the Criminal Procedural Rules Committee. Moreover, the financial burden which would result from requiring court-appointed counsel to travel to remote locations is formidable. For these reasons, State officials are presently considering the possibility of limiting the number of members of a minor judiciary empowered to conduct preliminary hearings.

It is clear that to accommodate the *Coleman* case, substantial procedural changes will have to be made, some by

the State Legislature and others by the Supreme Court of Pennsylvania through its rule-making power. To accommodate the requirements of *Roberts v. LaVallee, supra*, similar changes will be required. The *Coleman* decision having been rendered only four months ago, it could not reasonably be expected that the necessary procedural changes would have been accomplished throughout the State within the time which has elapsed. In the circumstances, the granting of injunctive relief by this Court so as to halt State criminal proceedings until the State establishes a procedure fulfilling the requirements of the aforementioned decisions would be an unwarranted and singularly inappropriate interference with the State's administration of its own criminal procedures.

Moreover, the Court does not find that plaintiffs and others similarly situated will suffer irreparable injury by the denial of the injunctive relief requested. In *Coleman v. Alabama, supra*, the Supreme Court specified the remedy available to an indigent defendant deprived of his right to counsel at a preliminary hearing—he may challenge the validity of his conviction where the deprivation of his right to counsel at a preliminary hearing in fact was prejudicial. This same remedy is available to the indigent defendant denied a transcript of the preliminary hearing. *Gardner v. United States, supra*, at p. 1267. With these remedies available in the course of plaintiffs' criminal proceedings, there is no necessity of injunctive relief here.

The Court is cognizant of those cases which there have been found exceptional circumstances warranting equitable interference with state criminal prosecutions. In *Dombrowski v. Pfister, supra*, the Supreme Court deemed ap-

propriate the issuance of an injunction to restrain pending State criminal prosecutions which allegedly were brought in bad faith and the very existence of which tended to have a chilling effect on First Amendment rights of freedom of expression. There is no allegation here that any of the prosecutions against plaintiffs have been brought in bad faith. Nor are rights of freedom of expression involved.

The cases cited by plaintiffs, *Phillips v. Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968) and *Bramlett v. Peterson*, 307 F. Supp. 1311 (M. D. Fla. 1969), also are distinguishable from the instant case. In *Phillips v. Cole, supra*, the Federal District Court enjoined State criminal proceedings against six indigent minor defendants where, seventeen months subsequent to the decision in *In re Gault*, 387, U. S. 1 (1966), the State court still failed to appoint counsel to represent minor defendants at trial. Similarly, in *Bramlett v. Peterson, supra*, a federal district court enjoined the prosecutions of all indigent misdemeanants where, nearly two years after the federal district court had vacated the State convictions of eight indigent misdemeanants for want of representation of counsel at trial, the State minor judiciary continued to deny indigent misdemeanants this right. In each case, despite the lapse of a substantial length of time, the State courts gave no indication of an attempt to comply with constitutional mandates. Such is not the case here for a very short time has elapsed since the *Coleman* decision, and all evidence indicates that State authorities are making good faith efforts to accommodate to that decision. Moreover, in each of the aforementioned cases, the failure to provide counsel at trial warranted automatic reversal of

the convictions. Consequently, injunctive relief merely accomplished what, in every instance, would have been accomplished by appeal subsequent to trial. Such is not the case here. There may be expected to be many instances in which deprivation of the right to counsel at a preliminary hearing will not result in such prejudice to the indigent defendant at trial as would warrant reversal of the conviction.

Also the injunctive relief sought here would not be without detriments to plaintiffs and others similarly situated. Plaintiffs seek an injunction restraining various stages in the criminal prosecutions of indigent defendants, the preliminary hearing, the grand jury proceedings, and the trial itself, until such time as their rights to the representation of counsel at their preliminary hearings and to transcriptions of the hearings are afforded to them. The likely result of such an injunction would be the delay of their criminal proceedings. This delay would favor neither those who would languish in jail during the pendency of the proceedings nor those released on bond during that period.

It is concluded that there are not existent in the instant case such special circumstances as would warrant the injunctive relief requested.

This Opinion shall constitute the Court's findings of fact and conclusions of law, consistent with Rule 52(a) of the Federal Rules of Civil Procedure. An appropriate order is entered.

ORDER

AND NOW, this 30 day of October, 1970, IT IS HEREBY ORDERED AND DECREED, consistent with the within Opinion, that the prayer for declaratory judgment is granted, and it is hereby declared:

1. That the practice of defendant-Magistrates in conducting preliminary hearings without advising plaintiffs and others similarly situated of their rights to representation by counsel at said hearings and without counsel being appointed to represent indigent defendants at said hearings where the right to counsel is not knowingly and understandably waived constitutes a violation of the rights accorded plaintiffs and others similarly situated under the Sixth and Fourteenth Amendments to the Constitution.

2. That the failure of defendant-Magistrates to provide plaintiffs and others similarly situated, upon request, with a free written transcription of tape recordings of their preliminary hearings, if not through utilization of the stenographic services of the State at least at the expense of the State, constitutes a violation of the rights accorded plaintiffs and others similarly situated by the Fourteenth Amendment to the Constitution.

IT IS FURTHER ORDERED that plaintiffs' request for a preliminary injunction be and the same is hereby denied.

/s/ WALLACE S. GOURLEY,
Senior District Judge.

APPENDIX B

Opinion of the Court

(Filed April 17, 1972)

Received
Apr 19 1972
Wallace S. Gourley
Judge, U. S. District Court

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 71-1011

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DeMEO, DOUGLAS HAYS and CHARLES ZEITLMEN, on behalf of themselves and all others similarly situated, and DEAN L. CRAIG and JOHN CHAWRYLUK, Intervening Plaintiffs,

Appellants,

v.

ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County,

Appellees.

Appeal From the United States District Court
For the Western District of Pennsylvania

Argued December 14, 1971

Before Van Dusen and Hunter, *Circuit Judges*, and Layton, *Senior District Judge*

HUNTER, *Circuit Judge.*

Appellants are indigents who have been charged with violations of the criminal laws of Pennsylvania and who are unable to afford or otherwise obtain counsel at their preliminary hearings. They brought this § 1983[1] Civil Rights action on behalf of themselves and others similarly situated[2] against appellees, the District Attorney of Allegheny County, Pennsylvania, and five city of Pittsburgh magistrates, claiming that their 6th and 14th Amendment rights as established by *Coleman v. Alabama*, 399 U. S. 1 (1970), are being systematically violated. Specifically, they challenge the Magistrates' practices of (1) refusing to advise indigents that they are entitled to counsel at preliminary hearings; (2) refusing to appoint counsel where requested; and (3) conducting preliminary hearings in the absence of counsel. In addition, they challenge the District Attorney's practice of presenting indictments, scheduling trials, and conducting criminal prosecutions against indigents who were not represented by counsel at preliminary hearings after June 22, 1970, the effective date of *Coleman, supra.*[3]

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[1] 42 U. S. C. § 1983.

[2] The District Court found that appellants adequately represented several classes of individuals charged with state criminal offenses. Included is a class comprised of those indigent defendants who have had preliminary hearings without being afforded counsel and who have been bound over to court; a class comprised of all indigent defendants who await preliminary hearings scheduled in the future and, within each such class, persons who are presently confined in jail in lieu of bond and others who have been released on bond.

[3] In Adams v. Illinois, 39 U. S. L. W. 4255 (U. S. March 6, 1972), the Supreme Court held that *Coleman* would not be applied retroactively.

Plaintiffs sought declaratory relief in the nature of a ruling that the stated practices were unconstitutional, as well as a permanent injunction (1) enjoining the District Attorney from proceeding to trial in any case in which an indigent neither was represented by counsel at his preliminary hearing nor knowingly and intelligently waived that right, and (2) restraining the Magistrates from conducting any further preliminary hearings without first fully advising indigent defendants of their right to court-appointed counsel and without appointing counsel where requested.

A final hearing was held in the District Court on October 19, 1970. The requested declaratory relief was granted. Injunctive relief was denied, however, and plaintiffs appeal that decision. *Conley v. Dauer*, 321 F. Supp. 723 (W. D. Pa. 1970). There is no cross-appeal from the declaratory ruling of unconstitutionality or from any of the other rulings of the District Court.[4]

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[4] In addition to arguing that injunctive relief was properly denied, Appellee-Magistrates contend that the District Court should have stayed its hand to afford the Pennsylvania courts an opportunity to decide a potentially dispositive question of state law. Appellees indicate the availability of a possible state statutory remedy in Section 7 of the Public Defender Act, 16 P. S. § 9960.7 (1971 Supp.) and argue that a possible interpretation of that Section by the Pennsylvania courts would obviate the necessity of reaching the Federal constitutional question. *See* R. R. Comm'n. v. Pullman Co., 312 U. S. 496 (1941); Reetz v. Bozanich, 397 U. S. 82 (1970); Askew v. Hargrave, 401 U. S. 476 (1971). Although Section 7 may, in fact, present a question of unclear state law, we agree with the District Court that the resolution of that issue would not obviate the necessity of deciding the federal question. We have in the instant case no question of the susceptibility of Section 7 of a construction by the state court that would "avoid or modify the constitutional question." Zwickler v. Koota, 389 U. S. 241, 244 (1967); *cf.* Askew v. Hargrave, *supra*; Reetz v. Bozanich, *supra*.

The facts are not in dispute and are for the most part drawn from the parties stipulation. In Allegheny County, which encompasses the City of Pittsburgh, indigent criminal defendants are represented at trial either by the Public Defender or private court-appointed counsel. However, only in capital cases are indigents apprised by the presiding authority of their right to counsel and, in fact, provided free counsel at the preliminary hearing stage. In all other criminal prosecutions, counsel is not provided unless a prima facie case of a defendant's guilt is established at the hearing and the defendant held for further proceedings. *See generally* Pa. R. Crim. P. 120-123; Public Defender Act §§ 6, 7, *supra* n. 4.

This situation is apparently the unfortunate result of the organization and structure of Allegheny County's minor judiciary. Pursuant to the Commonwealth's 1968 Constitutional Convention—which revised the Judiciary Article of the State Constitution—there are now several thousand authorities throughout Pennsylvania who are empowered to preside over preliminary hearings.[5] Thus in Allegheny County alone there are 64 magisterial districts in which preliminary hearings are conducted at numerous localities by some 246 magistrates, justices of the peace, and aldermen.[6]

Although *Coleman* did not decide that a preliminary hearing was constitutionally required, it did hold that when a state utilized the preliminary hearing as a stage of its

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[5] Pa. Const. Art. 5§ 1. *See also* Magisterial Districts Act, 42 P. S. § 1301 *et seq.* (Supp. 1971).

[6] Included in this figure are 61 District Justices of the Peace, five Magistrates in the City of Pittsburgh and 180 "grandfather" Aldermen and Justices of the Peace, whose terms of office began before the adoption of the Pennsylvania Constitution on April 23, 1968. All are empowered to conduct preliminary hearings.

criminal proceedings, the accused was entitled to counsel. 399 U. S. at 9-19.[7] Further, *Coleman* requires that indigents be provided counsel at *all* preliminary hearings and not simply in those cases in which a defendant is accused of a capital offense.[8] The Court's clear and unequivocal holding cannot be thwarted by the simple—albeit truthful—assertion that the structure of a county's minor judiciary makes compliance difficult. Nor can that holding be ignored by a county administration[9] which has apparently failed to make even those appropirations which would promptly insure at least partial compliance.[10]

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[7] The constitutional necessity and justification for assistance of counsel in criminal cases in general and at the preliminary hearing stage in particular does not require further comment here. *See* Gideon v. Wainwright, 372 U. S. 335 (1963); Powell v. Alabama, 287 U. S. 45 (1932); Coleman v. Alabama, *supra*. It is sufficient to note the Supreme Court's cogent statement in *Coleman, supra,* that the presence of counsel at the preliminary hearing "is essential to protect the indigent accused against an erroneous or improper prosecution." 399 U. S. at 9.

[8] Although the Alabama preliminary hearing at issue in *Coleman* differs from Pennsylvania's hearing as the latter does not set bail, appellees do not dispute that *Coleman,* requires counsel at hearings in Pennsylvania. *See* Commonwealth v. James, 440 Pa. 205, 209, 269 A. 2d 898, 900 (1970); Commonwealth v. Brown, 217 Pa. Super. 190, 194 n. 2, 269 A. 2d 383, 386 n. 2 (1970), holding that Pennsylvania's preliminary hearing is a "critical stage" at which the accused is entitled to counsel. *See also* Pa. R. Crim. P. 119, 318.

[9] Although suit was brought to enjoin appellees, it appears that appropriations for the Public Defender office are controlled by the Allegheny County Commissioners. Appellees, of course, have no control over the Commissioners' inaction.

[10] Counsel for appellants stated at oral argument, without contradiction from opposing counsel, that to remedy the situation in the City of Pittsburgh Magistrate's Court—which conducts only those preliminary hearings arising out of arrests by City police—it would merely require the retention of one or two additional attorneys since all City preliminary hearings are conducted in a single courtroom. Approximately half of all preliminary hearings conducted in Allegheny County take place in that courtroom.

The District Court, sitting only four months after Coleman was decided,[11] quite properly concluded that it could not reasonably expect Allegheny County officials to make the necessary procedural changes within the short time period that had elapsed. It therefore refused to grant injunctive relief.

It is now more than 20 months since *Coleman* and County authorities have yet to comply with its mandate. On oral argument, however, counsel for appellees *unequivocally stated that changes are imminent.*[12] In light of this assertion and subsequent supporting documentation,[13] we do not deem it appropriate to grant injunctive relief at this time.[14] Rather, we remand the case to the

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[11] The District Court sat October 19, 1970. *Coleman* was handed down on June 22, 1970.

[12] On November 22, 1971, (effective December 1, 1971) the Pennsylvania Supreme Court adopted an amendment to a Pa. R. Crim. P. 156 which would in effect allow the President Judge of a Pennsylvania Judicial District the discretion to determine what classes of cases necessitate centralized preliminary hearings and would require him to establish such central locations for the holding of those preliminary hearings. The application of the amended rule would, presumably, require the services of fewer attorneys than the current system.

[13] We have also been notified by counsel for the appellees that the Local Planning Council of the Governor's Justice Commission has approved a request from the Court of Common Pleas of Allegheny County for the necessary funds to hire twelve additional full time public defenders solely for use at preliminary hearings. Approval by the Justice Commission is pending.

[14] The District Court's opinion was handed down prior to the Supreme Court decisions in Younger v. Harris, 401 U. S. 37 (1971); Samuels v. Mackell, 401 U. S. 66 (1971); Boyle v. Landry, 401 U. S. 77 (1971); Perez v. Ledesma, 401 U. S. 82 (1971); Dyson v. Stein, 401 U. S. 200 (1971); and Byrne v. Karalexis, 401 U. S. 216 (1971). These cases, with the exception of *Samuels*, deal with the perplexing problem of when a federal court may appropriately enjoin a pending state criminal prosecution. Samuels discussed the circumstances in which a federal court may involve itself in a state criminal proceeding

(Footnote continued on following page)

District Court for the holding, promptly, of further proceedings to determine whether steps have been taken to insure

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(Footnote continued from preceding page)
by issuing declaratory relief pursuant to the Declaratory Judgment Act of 1934, 28 U. S. C. § 2201.

As the District Court relied heavily on Zwickler v. Koota, 389 U. S. 241 (1967), in granting its declaratory judgment, the subsequent decision in *Samuels* may have called for a different result on appeal had appellees taken a cross appeal from that declaratory judgment. Samuels v. Mackell, *supra*, 401 U. S. at 66 (1971). No appeal was taken, however, and declaratory judgment considerations are not before us. Swarb v. Lennox, 40 U. S. L. W. 4227 (U. S. February 24, 1972); Grove Press Inc. v. City of Philadelphia, 418 F. 2d 82, 85 (3d Cir. 1969).

28 U. S. C. § 2202 (1964) authorizes injunctive relief to complement a prior declaratory judgment and is one of the express exceptions to The Federal Anti-Injunction Act, 28 U. S. C. § 2283 (1964). *See also* Cooper v. Hutchinson, 184 F. 2d 119, 124 (3d Cir. 1950) (§ 1983 Civil Rights action falls within the "expressly authorized by Congress" exception to § 2283). Section 2202 states:

> "Further necessary or proper relief based in a declaratory judgment or decree may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment."

Relying on this statutory authority the Supreme Court stated that: "A declaratory judgment can be used as a predicate to further relief, including an injunction." Powell v. McCormack, 395 U. S. 486, 499 (1969). *See* Terry v. Adams, 345 U. S. 461 (1953); 6A Moore's Federal Practice § 57.10. Samuels v. Mackell, *supra*, 401 U. S. at 72. Although "voluntary compliance with the orders of Federal courts is the norm and *desideratum*," AMERICAN LAW INSTITUTE STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 323 (1969), and although we expect Allegheny County to fully comply with the District Court's declaratory judgment, a decision by the County to move ahead with prosecutions in disregard of that declaratory judgment could not be ignored. Not to allow injunctive relief in this case would place the District Court in the position of having granted declaratory relief, and then being unable to remedy the County's rejection of that judgment. This we cannot accept. Given the unique posture of this case, the District Court on remand should consider the appropriateness of injunctive relief pursuant to 28 U. S. C. § 2202.

The Court will, of course, also determine whether the developments described above, *supra* nn. 12, 13 have rendered the case moot.

that the *Coleman* mandate will be followed in Allegheny County in the immediate future. Included in the District Court's inquiry should be a determination of the *bona fides* of governmental action as well as a determination of whether the proposed new developments will be instituted and operable forthwith and whether these developments will, in fact, act to remedy the situation. In the event that the District Court finds that necessary steps are not being taken, it shall fashion whatever remedies it deems appropriate, consistent with our holding that *Coleman* must be followed and unjustifiable delay cannot be tolerated.

The case will be remanded to the District Court for further proceedings not inconsistent with this opinion.

A True Copy:

Teste

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

On Petition for Rehearing Before the Court En Banc

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 71-1011.

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DeMEO, DOUGLAS HAYS and CHARLES ZEITLMEN, on behalf of themselves and all others similarly situated, and DEAL L. CRAIG, and JOHN CHAWRYLUK, Intervening Plaintiffs,

Appellants.

v.

ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County,

Appellees.

Before Seitz, *Chief Judge*, and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Roney and Hunter, *Circuit Judges*, and Layton, *Senior District Judge*.

Per Curiam:

The petition for rehearing filed by Robert W. Duggan, individually and as District Attorney of Allegheny County, appellee in the above entitled case, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

Chief Judge Seitz does not desire rehearing only because the defendants did not appeal the judgment.

Dated: June 27, 1972.

ALDISERT, *Circuit Judge*, Dissenting Opinion *Sur* Petition for Rehearing.

I dissent from the denial of the petition for rehearing.

In my view, this court should have remanded the proceedings with a direction to dismiss the complaint because the alleged constitutional deprivation—failure of the state to provide counsel for indigents at preliminary hearings—concerns the assertion by each plaintiff of a federal right which may be vindicated in a defense in a single state criminal proceeding. *Younger v. Harris*, 401 U. S. 37 (1971); *Samuels v. Mackell*, 401 U. S. 66 (1971); *Boyle v. Landry*, 401 U. S. 77 (1971).

Younger, *Samuels*, and *Boyle*, all decided subsequent to the district court order, provide that federal interference in state prosecutions is severely circumscribed; that "exceptional circumstances" permitting federal equity interference presume a showing of irreparable injury, *Douglas v. City of Jeannette*, 319 U. S. 157, 163 (1943); that the injury must be "showing in the record," and not merely alleged,

Samuels, 401 U. S. at 68; that to overcome the "longstanding public policy against federal court interference with state court proceedings," *Younger*, 401 U. S. at 43, "even irreparable injury is insufficient unless it is 'both great and immediate'" *Ibid.*, 401 U. S. at 46; and that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable'." *Ibid.*

Thus, the district court was eminently correct in denying the requested injunction. That portion of its order should be affirmed. Because the declaratory judgment is now controlled by *Samuels*, holding that the practical effect of both injunctive and declaratory relief ordinarily is "virtually identical," and the propriety of declaratory and injunctive relief should be judged "by essentially the same standards," that portion of the district court's order should be vacated and the complaint dismissed.

Underlying the panel's decision is the faulty premise that a federal district court may somehow exercise supervisory or review functions over a state court system: "a decision by the County to move ahead with prosecutions in disregard of that declaratory judgment could not be ignored. Not to allow injunctive relief in this case would place the District Court in the position of having granted declaratory relief, and then being unable to remedy the County's rejection of that judgment. This we cannot accept. Given the unique posture of this case, the District Court on remand should consider the appropriateness of injunctive relief pursuant to 28 U. S. C. § 2202." (Slip opinion at 7, n. 14.)

Appendix C—On Petition for Rehearing before the Court En Banc

The panel's opinion closes with an instruction to the district court to "fashion whatever remedies it deems appropriate, consistent with our holding that *Coleman* must be followed and unjustifiable delay cannot be tolerated." Indeed! Tolerated by whom? *A federal district court has no supervisory or review power over any state court.* The seminal case of *Fay v. Noia*, 372 U. S. 391, 430 (1963), merely gave federal district courts jurisdiction to inquire into "detention simpliciter." When a non-custodial sentence is imposed by the state, a federal district court lacks even *habeas corpus* jurisdiction. *United States ex rel. Dessus v. Commonwealth of Pennsylvania*, 452 F. 2d 557, 559-60 (3d Cir. 1971). Similarly, a court of appeals has no power to review a state criminal proceeding. We may inquire only whether there has been an unconstitutional imposition of custody by the state.

Even more questionable is the notion that under the guise of § 1983, a federal district court may enjoin the state of Pennsylvania from prosecuting in Allegheny County, and the state courts from holding preliminary hearings, unless the panel's concept of *Coleman* be respected. There is simply no authority and no precedent for this federal intrusion into state criminal processes.

Douglas v. City of Jeannette, supra, announced the general rule that a federal court should refuse to "interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." 319 U. S. at 163. Later, in *Stefanelli v. Minard*, 342 U. S. 117, 120 (1951), the Court observed

that dictates of federalism demand that the federal judiciary respect state enforcement procedures except, as stated in *Douglas*, in "exceptional circumstances," because this area represents "perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." Severely limiting the concept of irreparable harm, the *Younger* Court reaffirmed this principle of comity as "a proper respect for state functions, a recognition of the fact that . . . the National Government will fare best if the States and their institutions are left to perform their separate functions in their separate ways." 401 U. S. at 44.

Moreover, I am not convinced that this court lacks jurisdiction to right the wrong of an improperly issued declaratory judgment affecting the delicate area of federal state relations, simply because no appeal was taken. "No appeal was taken, however, and declaratory judgment considerations are not before us." (Slip opinion at 7, n. 14.) There are two answers to this. First, the panel stated in one paragraph that declaratory judgment considerations "are not before us," and then proceeded in the very next paragraph to address itself to the "appropriateness of injunctive relief pursuant to 28 U. S. C. § 2202."[1] Thus, the very injunctive relief proposed by the panel inexorably brings into appellate purview the declaratory judgment, the substantive underpinning of the relief suggested by the panel.

[1] "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Secondly, I would notice the faulty declaratory judgment on appeal because the absence of true adversity between the parties to these proceedings raises a serious question of justiciability, and therefore jurisdiction. "It is a well settled principle that the question of subject matter jurisdiction is always open. It cannot be conferred or supplied by consent of both parties or by estoppel, laches, or waiver of either party. Eldridge v. Richfield Oil Corporation [247 F. Supp. 407 (S. D. Cal. 1965), aff'd 364 F. 2d 909 (9th Cir. 1966)]; Page v. Wright, 116 F. 2d 449 (7th Cir. 1940); Brown v. Fennell, 155 F. Supp. 424 (E. D. Pa. 1957)." *Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F. Supp. 1094, 1095 (E. D. Pa. 1968). Similarly, in *Moore v. Sylvania Products, Inc.*, 454 F. 2d 81, 84 (3d Cir. 1972), we noted that "[i]t is proper for this court to inquire into the jurisdictional prerequisites *sua sponte*."

The lack of the true adversary nature in the proceedings in the district court fairly leaps from the panel's opinion. The agency charged with supplying public defenders concededly is Allegheny County, Pennsylvania, yet, it is not a party to the action. Nevertheless, the panel's opinion states, "we expect Allegheny County to fully comply with the District Court's declaratory judgment." (Slip opinion at 7, n. 14.) The defendants are six magistrates of the City of Pittsburgh and the County District Attorney. None of the defendants has authority or jurisdiction to implement the district court's declaratory judgment or the panel's invitation to consider use of mandating an injunction to compel performance. Putting aside the recognized immunity of state judges under actions brought under 42 U. S. C. § 1983, *Pierson v. Ray*, 386 U. S. 547 (1967); *Bauers*

v. *Heisel*, 361 F. 2d 581 (3d Cir. 1966), and recognizing that the very function of the district attorney's office is prosecution, not defense, even if relief against the appropriate state government agency charged with the direction of the Public Defender program was not barred by *Younger v. Harris*, the lack of sufficient adversary parties made the entire proceedings defective under Article III standards. This defect goes to the heart of federal jurisdiction which may be raised by the court *sua sponte*.[2]

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[2] I would not put undue emphasis on *Swarb v. Lennox*, 405 U. S. 191 (1972), to avoid righting a district court order now deemed erroneous because of later decisions of the Supreme Court. Indeed, that case dramatically illustrates the practical necessity for true adversity in an Article III case and controversy. There "[t]he plaintiffs purport[ed] to act on behalf of a class consisting of all Pennsylvania residents who . . . signed documents containing cognovit provisions leading, or that could lead, to a confessed judgment in Philadelphia County. The defendants are the county's prothonotary and sheriff, the officials responsible, respectively, for the recording of confessed judgments and for executing upon them. . . . A group of finance companies were permitted to intervene." *Swarb v. Lennox*, 405 U. S. at 196-97. Although the plaintiffs appealed from the restriction of their purported class, the defendants and intervening finance companies took no appeal. The interesting question presents itself: would a defendant having a direct financial interest in the outcome of the three-judge court's decision have taken an appeal? In the companion case, *D. H. Overmyer Co. v. Frick Co.*, 405 U. S. 174 (1972), involving true adverse parties to a cognovit note, the Court refused to accept the argument that a procedure under the cognovit clause was unconstitutional *per se*. In *Swarb* the Court observed: "*Overmyer* necessarily reveals some discomfiture on our part with respect to the present case. However that may be, the impact and effect of *Overmyer* upon the Pennsylvania system are not to be delineated in the one-sided appeal in this case and we make no attempt to do so." *Swarb v. Lennox*, *supra*, at 201-02.

I am not aware that the justiciability issue was raised in *Swarb*, as I am here, but the case strikes me as a classic example of the danger which inheres when there is an absence of true adversity between the

(Footnote continued on following page)

Appendix C—On Petition for Rehearing before the Court En Banc

These proceedings, like *Swarb v. Lennox, supra*, illustrate "the risk that comes from passing on abstract questions rather than limiting decisions to concrete cases in which a question is precisely framed by a clash of genuine adversary argument exploring every aspect of the issue." Wright, Law of Federal Courts, § 12, p. 37, citing *United States v. Fruehauf*, 365 U. S. 146 (1961); *Golden v. Zwickler*, 394 U. S. 103 (1969).

Therefore, I respectfully dissent from the denial of the petition for rehearing *en banc*.

A True Copy:

Teste:

Clerk of the United States Court of Appeals For the Third Circuit.

(Footnote continued from preceding page)
plaintiff and defendant. *Swarb* has created a jurisprudential vacuum in Pennsylvania. In Recommendation No. 37, the Procedural Rules Committee of the Pennsylvania Supreme Court noted that the *Swarb* Court said that the problems raised by the three-judge court decision are "peculiarly appropriate grist for the legislative mill." The Committee also noted "the three-judge decree in *Swarb* remains in full force and effect, with its confusingly limited coverage and the troublesome problems it raises for the prothonotaries and sheriffs throughout the Commonwealth. . . ". *The Legal Intelligencer*, May 24, 1972.

APPENDIX D

Motion for Stay of Mandate by Robert W. Duggan, Appellee

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORT, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DEMEO, DOUGLAS HAYS AND CHARLES ZEITLMEN, on behalf of themselves and all other similarly situated, and DEAN L. CRAIG and JOHN CRAWRYLUK, Intervening Plaintiffs,

Appellants,

v.

ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County,

Appellees.

No. 71-1011.

The appellee above named respectfully moves this Honorable Court to stay the mandate in the above entitled action and not permit the same to be issued out of said cause until the further order of the court, on the ground and for the reason that appellee expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari of the decision and judgment rendered in favor of appellants and against appellee in the above entitled action, and:

Appendix D—Motion for Stay of Mandate by Robert W. Duggan, Appellee

Appellee further shows to the court that he is ready, able and willing to make a good and sufficient bond, conditioned as provided by law, in said cause.

WHEREFORE, appellee prays that the court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled action until the further order of the court, and that the court fix the amount of the bond required of appellee, and that he be given a reasonable time in which to make, execute and file said bond.

Respectfully submitted,

ROBERT W. DUGGAN,
District Attorney.

CAROL MARY LOS,
Assistant District Attorney.

Appendix D—Motion for Stay of Mandate by Robert W. Duggan, Appellee

CAROL MARY LOS, upon oath, says:

That she is one of the attorneys of record for the appellee in the above entitled action; that she served a copy of the above and foregoing motion upon appellants by mailing to Neighborhood Legal Services, 310 Plaza Building, Pittsburgh Pennsylvania 15219, Counsel for appellants, said copy being mailed by regular United States mail with the postage duly paid thereon, and the same having been deposited in the post office at Union Trust Building, Pittsburgh, Pennsylvania 15219 on June 3, 1972.

CAROL MARY LOS.

Sworn to and subscribed before me
this 3rd day of July 1972.
Maria S. Schuetz,
Notary Public, Pittsburgh, Allegheny County Pa.
My Commission Expires October 2, 1972.

Appendix D—Motion for Stay of Mandate by Robert W. Duggan, Appellee

Office of the Clerk
UNITED STATES COURT OF APPEALS
For the Third Circuit
2046 U. S. Courthouse
Ninth & Chestnut Streets
Philadelphia 1907

Thomas F. Quinn
Clerk

Telephone
215-597-2995

July 13, 1972

Re: Ozel Conley, *et al.*, Appellants v. Dauer, et al.
No. 71-1011

Enclosed herewith is conformed copy of order entered today.

Very truly yours,

THOMAS QUINN
T. F. Quinn,
Clerk.

Kn
cc: To all parties

Jul. 14, 1972.

Appendix D—Motion for Stay of Mandate by Robert W. Duggan, Appellee

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1011

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DaMEO, DOUGLAS HAYS and CHARLES ZEITLMAN, on behalf of themselves and all others similarly situated,
Appellants,

vs.

ROBERT E. DAUER, JOHN CHAPAS, LEWIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh, and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County,

DEAN J. CRAIG, JOHN CHAWRYLUK,
(*Intervening Plaintiffs in D. C.*).

(D. C. Civil Action No. 71-1130)

Pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 3, 1972.

JAMES HUNTER, III
Circuit Judge.

Dated: July 13, 1972.

APPENDIX E

Motion for Extension of Stay of Mandate under Rule 41 (b)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DEMEO, DOUGLAS HAYS and CHARLES ZEITLMEN, on behalf of themselves and all other similarly situated and DEAN L. CRAIG and JOHN CRAWRYLUK, Intervening Plaintffs,

Appellants,

v.

ROBERT E. DAUER, JOHN CHARLES, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County.

Appellees.

No. 71-1011.

AND Now, comes the Commonwealth of Pennsylvania by its Attorneys, ROBERT W. DUGGAN, District Attorney of Allegheny County, Pennsylvania and J. KENT CULLEY, Assistant District Attorney and requests that the Motion For Extension of Stay of Mandate Under Rule 41 (b) be granted for the following reasons:

1. On June 27, 1972 your Honorable Court denied appellee's Petition for Rehearing Before the Court *En Banc* in connection with the above-captioned matter.

Appendix E—Motion for Extension of Stay of Mandate Under Rule 41 (b)

2. On July 13, 1972 your Honorable Court ordered a Stay of Mandate, pursuant to Rule 41 (b), until August 3, 1972.

3. At the present time appellees are preparing and will file a Petition for a Writ of Certiorari to the United States Supreme Court and requests that your Honorable Court grant an Extension of the Stay of Mandate until September 27, 1972.

4. Appellees expects to file its Petition for a Writ of Certiorari prior to the 90 day appeal period but are currently seeking information from all other jurisdictions of the United States concerning their efforts to comply with the ruling of *Coleman v. Alabama*, 399 U. S. 1 (1970), and need additional time beyond August 3, 1972 in order to complete its investigation.

5. Appellees have requested those jurisdictions whom it has contacted to reply as early as possible but it is believed that such an investigation may not be complete until mid August and appellees' petition to the Supreme Court, therefore, will not be able to be completed and filed until late August or early September.

WHEREFORE, for the reasons set forth above, appellees respectfully requests your Honorable Court grant an Extension of its Stay of Mandate until September 27, 1972.

Respectfully submitted,

ROBERT W. DUGGAN,
District Attorney.

J. KENT CULLEY,
Assistant District Attorney.

Appendix E—Motion for Extension of Stay of Mandate Under Rule 41 (b)

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

AFFIDAVIT.

Before me the undersigned authority, personally appeared J. KENT CULLEY, who being duly sworn according to law, deposes and says that he is an Assistant District Attorney and as such is authorized to make this affidavit that the facts contained in the foregoing are true and correct to the best of his knowledge, information and belief.

J. KENT CULLEY.

Sworn to and subscribed before me
this 26th day of July 1972.
Maria S. Schuetz,
Notary Public, Pittsburgh, Allegheny County, Pa.
My Commission Expires October 2, 1972.

Appendix E—Motion for Extension of Stay of Mandate Under Rule 41 (b)

IN THE

THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORT, FRED GREEN, JOSEPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DEMEO, DOUGLAS HAYS AND CHARLES ZEITLMEN, on behalf of themselves and all other similarly situated, and DEAN L. CRAIG and JOHN CRAWRYLUK, Intervening Plaintiffs,

Appellants,

v.

ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and Robert W. DUGGAN, individually and as District Attorney of Allegheny County.

Appellees.

No. 71-1011.

J. KENT CULLEY, upon oath, says:

That he is one of the attorneys of record for the appellee in the above entitled action; that he served a copy of the above and foregoing motion upon appellants by mailing to Neighborhood Legal Services, 310 Plaza Building, Pittsburgh Pennsylvania 15219, counsel for appellants, said copy being mailed by regular United States mail with

the postage duly paid thereon, and the same having been deposited in the post office at Union Trust Building, Pittsburgh, Pennsylvania 15219 on July 27, 1972.

J. KENT CULLEY.

Sworn to and subscribed before me
this 28th day of July 1972.
Maria S. Schuetz,
Notary Public, Pittsburgh, Allegheny County, Pa.
My Commission Expires October 2, 1972.

Appendix E—Motion for Extension of Stay of Mandate Under Rule 41 (b)

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
2046 U. S. Courthouse
Ninth & Chestnut Streets
Philadelphia 19107

Thomas F. Quinn
Clerk

Telephone
215-597-2995

August 4, 1972

J. Kent Culley, Esquire
Assistant District Attorney
301 Court House
Pittsburgh, Penna. 15219

Re: Ozel Conley, *et al.*, Appellants vs. Dauer, *et al.*
No. 71-1011

Dear Mr. Culley:

Enclosed herewith is a conformed copy of the order staying issuance of the mandate to Sept. 25, 1972, in the above-entitled case. If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,

M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

bjr
cc: R. Stanton Wettick, Jr., Esquire
Eugene B. Strassburger, III, Esquire

Appendix E—Motion for Extension of Stay of Mandate Under Rule 41 (b)

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 71-1011

OZEL CONLEY, LEWIS STEWARD, DOUGLAS SIZEMORE, FRED GREEN, JOSPH BOLAR, EARL AGURS, MARVIN KENNEDY, CHARLES DEMEO, DOUGLAS HAYS AND CHARLES ZEITLMEN, on behalf of themselves and all other similarly situated and DEAN L. CRAIG and JOHN CRAWRYLUK, Intervening Plaintiffs,

Appellants,

vs.

ROBERT E. DAUER, JOHN CHAPAS, LOUIS DADOWSKI, EARL HARRIS and ANTHONY TROIANO, individually and as City Magistrates for the City of Pittsburgh and ROBERT W. DUGGAN, individually and as District Attorney of Allegheny County.

Pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure, it is Ordered that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until September 25, 1972.

JAMES HUNTER,
Circuit Judge.

Dated: August 4, 1972.